

The University of Chicago

THE CATEGORIES OF POLITICAL ANALYSIS

A PART OF A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE
HUMANITIES IN CANDIDACY FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF PHILOSOPHY

1939

By

GLENN ROBERT NEGLEY

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CHAPTER II

POLITICAL POINTS-OF-VIEW

Individualism is quite justified in demanding recognition of its methodological point-of-view as essential to the construction of political meaning; but Individualism is not the only point-of-view which can claim analytic relevance. The observation adduced by two other points-of-view cannot be ignored if comprehension is the end of analysis. These points-of-view may be termed the Formal and the Corporate.

Formal analysis is concerned with such factors as laws, regulations, and statutes; and one implication of this description is that law is not principle. The identity which is often assumed between law and principle has been a never-ending source of trouble in political speculation. Certainly no one would propose a statute ruling that all men are equal; yet it has appeared necessary in order to justify the imperative character of law, to substantiate it by some such identification with principle. True, law must manifest a character of imperativeness; but it is for precisely this reason that it cannot be identified with principles, which have no imperative character whatever. Law is a fact or condition of political process, in the same manner in which the individual is such a fact or condition. The misstatement of the nature of law has proved vicious when, rather than furnishing an explication of the nature of law as analytic fact, speculation has endowed the law with the sacrosanct qualities of a principle which has somehow got itself invested with metaphysical and cosmological significations. Thus it is that the "law" is conceived as a statutory expression of natural law, and the unnatural transition between law and natural law is rendered plausible by the intervention of a hypothetical fluid known as natural right. Natural rights thus become defined as principled dicta which are yet capable of expression in a form available for practical application.

How successful has been the attempt to incorporate natural rights in practical legal concepts is a matter for observa-

tion. The intervention of one or any number of symbols between principles and practice does not eliminate the necessity of defining the principle in terms of the conditions within which it is to be applied; and the concept of natural rights is as general, as unconditioned, as inapplicable to legal problems as is the original principle of natural law. The refusal to admit this necessity of correlation, and the insistence that some of the immutability of principle is carried over into the law, has resulted in a paradoxical acceptance of legislated or statutory law as a static statement of eternal principle. Thus, changes in the law to suit changing conditions are not effected gradually and rationally when needed, but only under the impact of near catastrophes. Law must collapse before it can be changed, and then only upon some rationalized pretext such as the stupidity of previous judicial interpretation. As a consequence, the legitimate function of law is precluded by its post facto definition.

In the absence of an adequate statement of the Formal point-of-view and an integration of that analysis with other views of the political complex, recourse is had to the escape-mechanism of "fact." Refusal to recognize law as an analytic fact, product of point-of-view method, necessitates the attempt to state law as a real or natural fact. The integers of thought, of meaning, and hence of political integration, are analytic facts; and the confusion of these two levels of "fact" involves the positive rejection of thought as a source of knowledge and observation.

The failure to distinguish analytic from cosmological is equally common to statements of the Corporate point-of-view. It would seem that an analysis which is concerned mainly with material objects and things would be forced to maintain such a distinction. One instance will suffice to indicate how complete has been the ignorance of analytic factual evidence: we have but to consider the manner in which "liberal" economics has attempted to define property by reference to the principles of liberty and freedom. In the absence of the restraint exercised by factual reference, such principles have a tendency to get out of hand, and what is defined as liberty in principle becomes license in practice. There are indeed statements of the Corporate point-of-view, and of the Formal as well, which do recognize the nature and importance of their analytic methods of observation. The difficulty appears to be the comprehension of more than a single point-of-

view. Corporate analysis tries to apply its particular method to the Formal and Individual points-of-view, and so with these latter two, until analysis ends in the process of mutual reduction and reaffirmation of ideologies.

The dichotomy of principles and practice, of ideology and methodology, suggests the observation that the construction of an ideology is a comparatively simple task, but the demands of political activity are such as to require an ideology and a methodology which will not conflict in practice. It is not enough to set up an ideology and then trust to the benevolence of the Creator, man, or chance that its ends will in good time be attained. If there is any specific characteristic of modern thought, it is the serious questioning of the traditional and barbaric assumption that once an end is defined, it matters little what means are taken to arrive thereat. Dictatorships but demonstrate the brutality residing in all ideological constructions which do not feel the restraint of fact and method.

The emphasis upon ideology to the neglect of method is not peculiar to the practical area of activity; it is even more typical of that kind of analysis which we call scientific or speculative or philosophical. Perhaps the most prevalent view in current thought is the recognition of the relativities involved in points-of-view. Peculiarly enough, this is called a "realistic" view; as a matter of fact, it is a quite unrealistic kind of analysis, simply because the relativity is conceived as existing at the ideological level. It is assumed that a fact is a fact, that relative points-of-view arise because not all fact is known or admitted, and that the solution of disrupting relativity is to be found in the attainment of an omniscient objectivity which will comprehend all possible points-of-view.

The objectivity of fact is apparently never questioned. The most vital product of the Kantian analysis is completely ignored: namely, that there is for knowledge and activity no such thing as fact in non-analytic objectivity; there is only fact as known. The process of knowing is itself a contributing factor to the relativity of points-of-view. Conflicts of interpretation arise not so much because of ignorance of fact, but because of different interpretations of fact. It is a truism that to define a problem is to answer it and to agree thereupon, and this is true simply because such a procedure necessitates the removal of points-

of-view concerning the fact in question. Science looks at a stone and sees therein a fact, but economics sees in the same object a different fact; and religion, architecture, philosophy, cosmology, politics, the farmer--all see in the stone quite different facts. This nature of the knowing process is commonplace; and it is a commonplace of philosophical analysis--or at least should be--that if this point-of-view relativity marks a final limit of the knowing process, then both knowing and activity are grounded in utter irrationality.

Thus, the uncompromising relativity of points-of-view has been the source of what is probably the most persistent problem raised by speculative analysis. In the absence of a degree of objectivity which will permit the survey and correlation of all possible perspectives, the modest mind must admit no recourse except to select the most attractive or most available perspective and to rest content with the partial analysis which it makes possible. Thought which inclines to the "scientific" kind of analysis, set to the exploration and description of ever more minute items within ever more minute areas of investigation, may well be content to adopt such a limited perspective; and the result of such analysis, while sometimes trivial, is in the aggregate useful, interesting, and necessary to the process of widening knowledge by acquaintance with particulars.

The problem set for philosophical analysis is precisely the coordination of all these individual perspectives into some more comprehensive view than is afforded by the limited scope of more specialized analyses. The typical procedure of philosophy has thus been the statement of relations in universal form--that is, of relations which may be said to hold of any and all facts and in any and all perspectives. The philosopher has then been interested in impressing upon less comprehensive systems of analysis his conviction that such relations or concepts must be granted a reality or factuality of even greater significance than the more minute particles of fact with which specific, restricted scientific analyses operate.

Whether these philosophical attempts to explain the patterns of wholeness evidenced by all possible fact be based upon metaphysical, theological, or astrological grounds, they all indicate the irresistible demand of thought for a pattern of meaning. This is not an unnatural or irrational desire, for without

some such pattern, real or assumed, the possibility of meaning in any other than the most limited sense is negated. Thus, the pattern observed or assumed will tend to adjust, or perhaps to pervert, into its mold the facts made available by specialized analyses. Religion has in this manner found it comparatively easy to absorb into its systematic pattern the increasing variety of scientific fact and, on the whole, has adjusted that fact with comparative speed and facility.

The history of speculative enterprise suggests doubt as to the impact of scientific fact upon the nature of universal patterns, and the absence of any proof of actual correlation between fact and system gives the appearance of a dichotomy. Philosophical analysis need not, and usually does not, concern itself with facts as such; it proceeds with the assurance that whatever fact may be observed will be readily adjustable to the philosophical system. Obviously, the test of a speculative or philosophical system is then its appropriateness to the fact it seeks to correlate into a pattern of meaning. The absorption of fact into the system without necessitating the perversion of either is the test of the system, and its only and final test. On the other hand, systematizers have adopted the characteristic attitude of assuming that the adaptability of fact to the system is the proof, not of the system, but of the fact.

The result has been a conflict of speculative system and scientific fact which proves devastating to practical activity, especially in its moral or political aspect. It spells the absolute disparity of theory and practice which is typical of human activity, source of the aggressive complaint of youth, the pessimistic lament of age. In contemporary terms, the conflict may be stated as that between ideology and methodology, and these terms are particularly applicable to the field of political or social activity.

Analogous to the three analytic points-of-view suggested above, political speculation has historically ranged itself into three rather determinate positions which I shall later distinguish as Individualism, Corporatism, and Formalism. Each of these doctrines represents, not a factual analysis, but rather an ideological emphasis which uses a partial analysis of factual conditions to substantiate its preconceived principles. This restriction in selection of fact results necessarily in a segmental meth-

od of observation. The method adopted by each of these three political ideologies is designed with specialized reference to a point-of-view; and this adoption of method necessarily influences the selection and interpretation of fact. Specialization is indeed legitimate in method, as elsewhere, and needs in itself no justification; but meaning results from the resolution of point-of-view relativity, not from its deliberate perpetuation.

The segmental approach to the analysis of fact which has characterized political thought is a result of the failure to distinguish the respective functions of the practical and the theoretical--that is, of methodology and ideology. The theoretical and speculative has traditionally been assumed as the goal and purpose of the practical; hence, the sole function of method becomes the achievement of a previsioned ideological pattern. So integral to thought and activity has this assumption become that it is only by consciously belabored effort that man can draw any distinction between idea and ideal, and even then the difference appears to him rather artificial.

To call this a Platonic heritage is unjust; let us simply say that Plato indulged the tendency; for the readiness with which method is subjugated to ideal appears so characteristic of human activity that it may well be termed a tendency of speculative construction. This in itself may be the explanation of the minimum effect exerted upon human affairs by rational speculation, of why the man of power has always been able to impose an ideological pattern contrary to all logic, fact, and theory. Ethical and political speculation have indulged the error to the point of tedium, have become thereby factors of minimum determination in human activity.

Such a lack of effectiveness is the natural result of the segmental method, even though the particularity of the three kinds of political analysis has been that of emphasis rather than of content. Even the relativity of fact is insistent; and the sum of conditions which are requisite to give the political structure its total possible meaning, continues to intrude upon the most restrictive speculation. These conditions can, however, be rendered practically inoperative and unintelligible by interpretation, and this is exactly what is accomplished by an analysis which deliberately restricts its method to the support of an ideological point-of-view. The method of Individualism, for example, operates

in such manner as to reduce the material and positive factors of political organization almost to meaningless subservience to the ideology of individual liberty and freedom. Thus, Individualism insists upon defining the state in categories peculiar to the point-of-view which emphasizes the individual as the sole condition of political organization, and the resulting definition of the state fails to define a state as such. Individualism defines the state as a simple collectivity of individuals, because it has designed a method which is suitable to observe only the individual. In the same manner, Corporatism, the theory which emphasizes material conditions, reduces the concept of individual to meaninglessness by insisting upon the application of definitive terms and categories, derived from an analysis of the Institution or corporate entity, to a factual condition which these categories are inappropriate to analyze. The result of this sterility of method and observation is irrelevance in all matters of fact beyond the confines of the point-of-view for which the specific method was designed; and this means simply that comprehension of the sum of factual conditions which are necessary to constitute political or social meaning is never attained by such methods of analysis.

The irrational synthesis attempted by the point-of-view method in politics can have but one result: the interpretation, that is, the manipulation and contortion, of facts and conditions to the terms of a selected and largely arbitrary ideology of principle. It is not surprising, then, that the three methods typical of political thought should each formulate, or adopt, its particular and unique theory of political organization and activity; nor is it surprising that, while each is especially competent within the range of its original analysis, it should prove incompetent and inadequate in regard to the facts which occupy a position of major importance for the other forms of analysis. Individualism has proclaimed itself the philosophy of democracy; Corporatism in its various forms has been adduced to supply the theoretical justification for the administration of totalitarian states, and with more justification, has also been referred to rather haphazardly in reference to autonomous sanction, more familiarly known as status quo; Formalism, although it has issued in no specific kind of administrative organization, has not been without influence: it has perpetuated itself and exerted impact

upon the political process through the channels of legalistic method and practice.

Thus, we have on the stage of political speculation three contenders vying for honors; and it must be reiterated that, as far as their intrinsic merits are concerned, one is as valid and as legitimate as the others. Each may boast its recognition of an analytic point-of-view neglected by the other political forms, and claim that certain results beneficial to man and society accrue from that recognition. Choose we may among the benefits--individual, corporate, or positive--but our choice will be largely determined by non-rational ideological factors. Not all the shouting for democracy comes from the throats of humanitarians, as certainly not all the inclination toward dictatorships is evidenced by escapists.

None of the traditional political theories appears adequate to comprehend all the facts of the political complex of meaning, inasmuch as each delimits the range of its factual analysis by the adoption of a point-of-view method. Perhaps no systematization is sufficient to achieve this most desirable, and most presumptuous, end; but in order to attain even a recognition of the fact involved in the total area of political meaning, it is necessary to make use of some system or method of analysis devised for the purpose of comprehending fact, not for the support of a particular ideology. This implies that primary emphasis will be upon methodology, but it is a false dichotomy to presume that ideology and methodology can so easily be separated and distinguished. Methodology has a definitive as well as an end-reaching function, and ends are actually attained only by the joint operation of ideological and methodological devices and patterns. This is the fly in the ointment of Mannheim's "political sociology" practised by a "socially unattached intelligentsia."

Principles do, indeed, contribute to the relevance of data; but facility is as indispensable to meaning as is relevance, and it is not wise to achieve one at the expense of the other. The simple truism that "all the facts are never in" necessitates this facility of principled structure and methodological analysis; rigidity in structure or method involves a distortion of fact. If this emphasis upon the nature of method appears unduly strenuous, or if it appears to sound an apologetic note, let the plea be that of precaution against over-indulgence in the pleasure of system-

atization. Out-talking one's information in interesting, necessary, and legitimate in many connections; but some effort should be made to keep that tendency under control in methodological analysis. When the road is under construction, the traveler proceeds at his own risk. The short-cut of easy systematization is hardly worth the wear and tear on the apparatus; but neither is it sensible to wander off on every attractive detour.

The end toward which thought proceeds in its utilization of methodological devices is the classification, order, and control of fact. In so far as it recognizes this valid function of method, speculative thought must keep itself balanced between the horns of the methodological dilemma. To permit the dictation or control of analysis by desire, to allow the subjection of method to principle, is to effect the negation of both method and desire. On the other hand, the fact that desire or principle does manifestly constitute the framework, for which method supplies the factual content, makes it inevitable that some influence of method by predilection, assumption, hypothesis, or desire will be exerted. The reality of the dilemma leaves thought no alternative but that of playing both ends against the middle. At any rate, it seems probable that the disturbing question of the relation between ideological principles and methodological devices will not be made any less clear by an analysis of the fact which alone makes possible the implementation of either or both these aspects of thought and activity.

I think it but fair to suggest at this point that the ideological motivations from which the points-of-view of Individualism, Corporatism, and Formalism derive are in themselves worthy principles of endeavor. Each point-of-view sets up a method of analysis which will ensure the interpretation of fact in such manner as to document its peculiar principle. For Individualism, this principle is liberty or freedom; Corporatism demands security or stability; and Formalism substantiates the principle of equality or justice. Let weak-minded and strong-armed dictators bellow that these are the virtues of weaklings; political organization must achieve these three fundamental human wants or continue to fluctuate between less comprehensive systems which provide first one, then another.

The insistence that method is intrinsic to thought is simply the affirmation that human thought is meaningless apart

from human activity. Method then sets the first task of thought: that of determining what manner and extent of activity or application of thought is possible. Unless this be the prolegomena of speculation, it is likely that the final product of thought will be fantasy or poetry, neither of which is particularly effective in the political arena. Retroactively, method must make its adjustments to these determinations within the range of possibility.

The circle is vicious and uncompromising; method must supply its own catharsis or fail relevance to activity, and at its best, thought will never quite manage complete adequacy to the demands of problematic situations of action. The factual situation which we have referred to as "complex" is just that--complex. It would be naïve to expect that the three points-of-view or components of meaning to which we have called attention might be discovered lying in neat, orderly pattern of factual design. It would greatly simplify the problems of politics, and all other problems, if fact were, or could be, so neatly subdivided into convenient parcels; but the conditions of activity do not come in packages. The most simple meaning situation conceivable presents a complicated mass of factual material which would seem to defy analysis, and the digging-in process of analysis is a job of separating out from this homogeneous welter quantities which are small enough to permit observation.

This dilemma is not peculiar to politics; it is characteristic of the nature of thought, an unavoidable aspect of any methodology. So, in defining the political complex as exhibiting three distinguishable points-of-view from which analysis can proceed, it cannot be too strenuously insisted that there is implied no intention of ascribing this classificatory schema to the fact itself. What single fact could be adduced which would not in itself evidence all the three aspects, if for no other reason than by virtue of the relations which are inextricably associated with that single fact? The analytic method which tears fact from its contextual complex for purposes of observation will result only in utter nonsense if such hypostatizations are then taken as representative of any real situation of fact or meaning. The distinction of analytic and real is the price of sanity, and speculation must not be permitted to take injudicious advantage of this limi-

tation.¹

In this analysis, then, we shall be dealing with abstractions taken from the total complex of political fact for the purpose of observation, classification, and control, for control is presumed in regard to political fact. This implies an important consideration which is often the source of a destructive methodological fallacy. Realization that the descriptive classification abstracted by thought from factual situations is only an abstraction, a methodological device for observation, forces the admission that the relations perceived as existing between and among these classificatory divisions are likewise abstract, implicates of methodological analysis rather than of reality. As with the categories of classification, so with the relations between them: their reality by no means follows from their mere statement; and it must be kept in mind that the establishment of a metaphysical, ontological, or even an empirical reality for these categories of observation is an entirely different problem from that of establishing and utilizing the method. Epistemology and metaphysics are two distinct areas of interest, and identification of the two serves but to confuse both. For these methodological classifications, then, we shall claim only epistemological utility; with this definition in mind, let it be noted that the term category, by which these classifications will be designated hereafter, con-

¹In logical terms, we may say with F. H. Bradley that every predicate term is contained in its appropriate subject and that all predicates are contained in the most comprehensive subject--Reality or meaning. It is only by thought's process of separating finite predicates out from this Reality and first attaching them to an appropriate subject--that is, classifying them as a kind of condition--and second, referring them back to the Reality from which they came--that is, to the total meaning situation--that we approach a more adequate knowledge of that Reality or meaning. The Reality which finite thought cannot perceive in toto thus becomes progressively realized by logical analysis of the predicates which are separated out and made available for analysis by some method of observation. The whole of Reality is never known nor can total meaning ever be explicated; and because any single instance of Reality, or any designated fact or meaning reference, implies the whole of Reality or meaning, these instances or facts cannot even be completely comprehended in themselves.

veys only logical connotation.¹

The relative neglect of methodology from the standpoint of logical construction suggests that the discussion to follow is largely an experiment; but it appears that without some such attempt to discover what political fact is, how it is known, and what are the possibilities of its correlation, political conflict will continue to be perpetuated and perpetrated at the level of ideological sentiment. On the other hand, it would certainly be an unwarranted inference to assume that the three characteristic forms of political speculation have their grounds in nothing more substantial than mere caprice or ideological preference. Whatever ideological considerations may influence the nature of political methodology, there must be maintained a certain degree of continuity with fact and knowledge; and the observation that these political theories and methods constitute each a particular emphasis upon some kind or interpretation of fact suggests immediately the epistemological significance of the triad of points-of-view: Individualism, Corporatism, and Formalism.

This is precisely the order of development which the problem assumed in my own construction. Circumstances allowed me the privilege of making intimate contact in immediate succession with men and their analyses which emphasized respectively the points-of-view of Corporatism, Individualism, and legal Formalism. It became increasingly clear to me that each of these views could claim a high degree of factual relevance, but that the particular emphasis of each resulted in the neglect or perversion of that which was considered of primary importance by one or both the other points-of-view. Gradually, there developed in my own analysis a triadic conception of political theory and fact; as I subjected this nebulous method to the test of allocating fact, theory, and

¹The most careful distinction of epistemological categories and metaphysical constructions is that maintained by Kant. Whatever may have been his conception of the relation between thought and the phenomenal world, he remained clear as to the fact that any inference from knowledge to the facts and relations of the real world were of the nature of postulates, a postulation demanded by activity or practical reason. Because the practical reason forces thought to make these inferences beyond actual knowledge or pure reason, the practical assumes a position of primary importance, and Kant was well aware of the irrational dilemma in which man's practical reason forces his pure reason to extrapolate beyond its premises.

practice within the area of political thought and activity, it seemed to prove itself capable of comprehending and adjusting the various points-of-view with which I was presented from all sources.

That political theories could be thus allocated was the primary point of departure, but I found also that in the area of political activity, the method was equally adaptable to the comprehension of conflicting points-of-view. An experiment in tracing by historical documentation the conflict of these three points-of-view in the political development of the United States convinced me that here indeed was a method of observing and holding in the suspension of observation a range of fact which otherwise had seemed comprehensible only by jumping from one position to another until one finally gave up from sheer exhaustion and came to rest at one of the three viewpoints, from which his perspective was henceforth determined.

Now this sort of procedure is the essence of happy-thought philosophy, and before proceeding further with the pleasant allotment of political fact and theory according to my private scheme of analysis, I pulled up short with the observation that perhaps I was over-indulging in that particular avocation of the philosopher--solipsistic remodeling. This method of analysis, if it should prove to be a method, needed the support of something more substantial than my own manipulation, for indeed I might well be fooling myself with that easy trick of analysis--conjuring up exactly what I expected and wished to see. This attempt to adduce grounds in support of my own observation would at the same time perhaps suggest a more precise and consistent structure for the analysis itself. Two sources are available for such documentation of method: history and logic.

The first question is then whether the history of thought, especially of epistemological speculation, gives any evidence for the suggestion that knowledge has a tendency to range itself into a triadic pattern. Let it be kept clearly in mind that even if this should appear to be the case, it will not necessitate a concern as to whether this indicates anything concerning the nature of the fact itself, or whether it is symbolic of the structure of the universe. For the purposes of methodology, it will be sufficient if justification can be found for the more immediate designation of factual knowledge and activity as manifesting a triadic structure; our concern is with the structure of knowledge, and

this may be treated without particular consideration to the source of the structure. As a matter of fact, questions of origin have a tendency to be unintelligible, and it may be that the question of the origin of knowledge is of this nature. The second part of the documentation must necessarily consist of the statement of a sufficient logical ground for the method employed. A brief, but suggestive, statement of such historical and logical continuity is given in the appendices hereto.

The historical substantiation of logical pattern served to orient my construction of a method for the adjustment of political points-of-view. This does not mean that the interpretation of Bradley or any other historical system will serve as a formal model upon which to superimpose political terminology. The logical statement is suggestive of the problem involved; there is no intention of admitting any restriction upon the further discussion of this methodological problem, and the terminology and approach will be such as appears more suitable to the particular kind of analysis with which I am here concerned.

Three broad classifications have been suggested as derived from history and logical analysis: the Individual, the Corporate, and the Formal. The range of fact with which we have to deal is so great, and its nature so complex, that the limitations of comprehension necessitate breaking these points-of-view into smaller and more specific categories. Certainly any such selection of categories is to a large extent arbitrary, and the terminology employed is secondary to the primary interest of comprehending the particular point-of-view. The complexity of fact has, of course, already forced upon each point-of-view some such designation of levels of analysis; the procedure of each method must be respected as itself best qualified to formulate its own method and categories. Any attempt to give knowledge or fact a systematic pattern suffers from the scorn of the omniscient intellect which presumes to comprehend at one glance the entirety and the reality of what can be known. It is the felt inability thus to comprehend the whole that provides the justification for this discussion. Some such arrangement and classification of fact, however arbitrary the terminology, is essential to the comprehension of that complexity which constitutes meaning and knowledge in any factual or active situation.

To state at this point the categories which I have found

to be representative of each analytic point-of-view would be, of course, to anticipate the explanatory statements of those views. On the other hand, it seems likely that clarity may be served if I outline here the general pattern which was derived from an attempt thus to comprehend the nature of political points-of-view. Argument in support of the classification and of the comprehension of each view, as well as critical comments, will follow in detail. No distortion of methods or points-of-view was necessary to summarize the analysis of each under three major categories. That these categories are not simply arbitrary selections, but do in fact represent the analytic procedure of the respective points-of-view, will be demonstrated together with a description of the factual reference implied by the specific categories.

CATEGORIES OF POLITICAL POINTS-OF-VIEW

Individualism	Corporatism	Formalism
Physical Man	Nature	Mathematics
Social Group	Property	Logic
Person	Institution	Law

Historically, political speculation has tended to particularize and adapt its analysis to one point-of-view, which is seriously to restrict the relevance of that analysis. On the other hand, such specialized methods should be productive of particular competence within their own point-of-view, although the ultimate value of point-of-view analysis is largely negated by a failure of integration. Continuing the direction of my own construction, the description of analytic categories may be presented by an examination of the best available statement of these points-of-view in an effort to recognize what it is concerning the nature of political fact that each has emphasized with arguments which merit our attention

CHAPTER III

THE INDIVIDUALISM OF JEREMY BENTHAM

The point-of-view which emphasizes the importance of the Individual in the political complex seems to be a heritage of English and American thought, and no better spokesman could be found for this perspective than Jeremy Bentham. The thorough-going nature and far-reaching effect of his analysis is attested by the authoritative statement of Sir Henry Maine: "I do not know of a single legal reform effected since Bentham's day which cannot be traced to his influence." There is perhaps no other thinker of his stature who has shown more tenacity in the expression of the point-of-view which he deemed primary and elemental in the analysis of political meaning. Although his persistence sometimes led him into difficulty, Bentham insisted that the Individual as such be granted the status of political fact, that the Individual and his characteristics should not be interpreted or theorized out of consideration in political analysis. It is to our purpose to follow Bentham in this establishment of the Individual as political fact, maintaining the while a critical eye toward the maintenance of a fundamental logical structure in that analysis.¹

Whatever chronological position it may occupy in his thought, the hedonistic principle of pleasure-pain was the genetic origin of Bentham's analysis. Proceeding from the observation that the happiness of man constituted the only intelligible formulation of an ultimate end of moral and political speculation, he defined that happiness in its simplest terms as consisting of the acquisition of pleasure, the avoidance of pain. So strongly was Bentham impressed by this principle that he gave it dogmatic statement: "Every act whereby pleasure is reaped is, all conse-

¹It is unfortunate that much of Bentham's work is available only in the form of commentaries or editions of his notes, and that many of his manuscripts have not even been edited or published.

quences apart, good."¹ Just what constitutes a pleasure or a pain, Bentham never tells us, except to say ambiguously that they are "interesting perceptions."² To be sure, he lists for us his scale of pleasures and pains; but he is forced to admit that every person "is not only the best, but the only proper judge of what, with reference to himself, is pleasure, and what pain."³

Then, as a matter of fact, it would seem that at the very outset Bentham quite effectively forestalled analysis by proposing a system of moral and political anarchy; and this is, of course, what we might expect to eventuate from restriction and extension of the Individual point-of-view. Any analysis in terms of pleasure-pain is restricted by definition to a statement of the physical and psychological characteristics of Physical Man (Category I of Individualism). Hedonism is indeed a statement of anarchistic principle, if there can be such. But Bentham does not really mean all he says, and he is by no means satisfied to dismiss pleasure-pain in this cavalier fashion. Apparently, he could never forego the conviction that this observation of man's physical and mental activity, which was not a particularly unique observation on his part, would provide the principle for a comprehensive analysis of moral and political fact; and much of the merit of Bentham's work lies precisely in the fact that he admitted the need for such a principle and method of analysis, as well as to his clear statement of the conception. This recognition of the necessity for a method of analysis called for a statement of pleasure-pain in terms of analytic principle: "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure."⁴ Regard, however, the surreptitious manner in which Bentham has introduced into his analysis at this elementary

¹John Bowring, Deontology or The Science of Morality, from the MSS of Bentham (London: Longman, Rees, Orme, Browne, Green, and Longman, 1834), I, 59.

²Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (Oxford: Clarendon Press, 1907), p. 33.

³Bowring, Deontology, I, 59.

⁴Bentham, Principles of Morals and Legislation, p.1.

level two features which are by no means derivative from Individual analysis. From whence does he derive the information that "Nature" has placed man under this principle? All he knows from observation is that reaction to pleasures and pains is a characteristic feature of man's organic structure. Further, the use of such terms as "governance" and "sovereign master" makes it clear that the intention here is to state a law; but the function of analysis is to propose or formulate, not to assume or proclaim laws, and the terms of the definition indicate a failure to distinguish between principle and law.¹

Now if Bentham had meant simply to imply that human instincts are the source of all moral and political determinations and that man therefore exists according to determinations at the physical level, the limitations of his observation would be evident. Analogous to Descartes' proposal to construct a physical world out of matter and motion, Bentham boasted: "Give me the human sensibilities--joy and grief, pain and pleasure--and I will create a moral world."² Thus does he recognize and stress the characteristics of the first category, Physical Man, as they appear to the analyst who takes the Individual point-of-view. Bentham was not content, however, to stop with this simple observation; his construction from pleasure-pain was as limited as his statement had been exaggerated; one major difficulty in the remainder of his thought is the indiscriminate use of categories of analysis, for Bentham obviously recognized no necessity of making clear the point-of-view from which his observation and analysis were being made. Even in his definition of pleasure-pain, which is the fallacious instancing by example, he has already passed too casually to a view demanding another analytic category, that of Social Group. This is evidenced first by the substitution of the term "sensibility" for pleasure-pain determination. Certainly, these two might be taken as synonymous if so defined; but in ordinary usage the term sensibility is indicative of a development beyond simple organic determination, and Bentham takes advantage of usage to extend his concept of pleasure-pain to cover the range of two categories. Thus, in the list of circumstances which influence sensibility, we find such valid physical or first category characteristics as strength, bodily imper-

¹Cf. supra, p. 9.

²Bowring, Deontology, II, 10.

fection, degree of knowledge, intellectual powers, firmness of mind, perseverance, and bent of inclinations; but there follow without distinction other characteristics observable only under the second category, Social Group: moral sensibility, moral bias, religious sensibility and bias, sympathetic sensibility and bias, antipathetic sensibility and bias, pecuniary circumstance, and the like.¹ If these latter are characteristics descriptive of pleasure-pain determinations, then they indicate a departure from Bentham's original principle, a relapse which deprives pleasure-pain of any exact meaning or connotation. This marks the distinction between psychological or egoistic Hedonism and moral Hedonism or Utilitarianism.² Actually, Utilitarianism proves to be hedonistic only in setting and emphasis; it is better understood as a restatement of good-will theory from the point-of-view of Individualism.

Bentham recognized and criticized the fallacy of extrapolation beyond the limits set by a particular method of analysis, especially as evidenced by contract theory, but he proceeded to commit the same error in confusing the categories of individualistic analysis. The reality and nature of the facts which, taken together, are designated by the category of Social Group, present a new complexity which the method used at the level of Physical Man is inadequate to observe. That Bentham did, to some extent, recognize a difference of kind between these categorical or methodological levels is evidenced by the division he made in ethics between that concerning duty to one's self and that concerning duty to others. He never realized, however, that the "interests" which he made elemental in ethical determination were not to be defined simply by an extension of the observed characteristics of pleasure-pain, but were valid facts of another area of analysis. He came close to the point when he suggested that if "Experience is the Mother of Wisdom. . . .Interest is the Father";³ but the

¹Bentham, Principles of Morals and Legislation, pp. 44-5, and Etienne Dumont, Bentham's Theory of Legislation, trans. C. M. Atkinson (Oxford: Oxford University Press, 1914), I, 45 ff.

²Cf. Henry Sidgwick, The Methods of Ethics (London: Macmillan and Co., 1930), pp. 84 f.

³Jeremy Bentham, A Fragment on Government, ed. F. C. Montague (Oxford: Clarendon Press, 1891), chap. iii, sec. 16.

full implication of his facetiousness never eventuated in an adequate analysis of interest as contrasted to pleasure-pain. As a consequence, he persisted in the attempt to interpret all fact from the restricted point-of-view and from the method expressed by the first category, although on his own statement it appeared manifestly impossible. Thus, despite the affirmation of an ethic which might be called social, he feels constrained to state in the very next paragraph that "it cannot but be admitted, that the only interests which a man at all times and upon all occasions is sure to find adequate motives for consulting, are his own."¹

This insistence upon definition in terms restricted to the category of Physical Man is the source of that much-ridiculed proposal, the "moral calculus."² It is true that since Bentham's day we have learned much about the technique of measuring the reactions of physical man; but the limits of psychological measurement are prescribed by its method, and to propose a technique of moral measurement, a calculus of interests, appears so naïve that we are suspicious of a jest on Bentham's part. Ask anyone who has tried to weigh and balance interests within the comparatively limited range of his private opinion how readily they respond to measurement! That Bentham did recognize the extremity of his view is evidenced by his own admission of the confusion resulting from his failure to distinguish between pleasure-pain, happiness, sensibility, interest, and utility. He admits:

The word utility does not so clearly point to the ideas of pleasure and pain as the words happiness and felicity do; nor does it lead us to the consideration of the number, of the interests affected; to the number, as being the circumstance, which contributes, in the largest proportion, to the formation of the standards here in question.

For one who, in other connections, laid great stress upon the necessity for precision in terminology, Bentham was peculiarly negligent in the definition and use of the terms designating his categories of analysis.

The above quotation makes understandable the state of confusion in observation which is inescapable unless a clear distinction is maintained between categories of analysis and, more

¹Bentham, Principles of Morals and Legislation, p. 313.

²Dumont, op. cit., I, 43.

³Bentham, Principles of Morals and Legislation, p. 1, note.

importantly, unless the distinction of methodology which is implied by these categories is recognized; hence the persistent ambiguity of pleasure-pain and interests and utility. The Social Group begged analysis, and several times Bentham appeared ready to explore this area, as, for example, when he distinguished a natural from a political society, stating the essential characteristic of a natural society to be the "habit of conversing."¹ a recognition of Communication as a characteristic of the Social Group. It is unfortunate that the relation of private and social was not more carefully analyzed by Bentham; the confusion makes difficult a description of his method for analysis from the Individual point-of-view, for he continually insisted upon a limitation of methodology to the description of a technique peculiar to the observation of Physical Man, which is only one of the categories comprehended by the Individual point-of-view and by no means expressive of the range of Bentham's analysis.

Despite the repeated attempts to state his method in physical terms, Bentham did, to some extent, arrive at an integration of the Individual point-of-view, largely because he was too sagacious to ignore obvious fact. The ambiguity which prevails throughout his work is in strange contrast to his demand for systematic classification and precise terminology. Only his persistent and painstaking regard for fact makes his construction of Individualism noteworthy. His inconsistencies and violence of logic are perhaps the worst in a school of thought hardly noted for systematic clarification. The categories explanatory of the Individual point-of-view never seem to have assumed their proper relation for Bentham, except that he reiterated the basic and elemental nature of Physical Man. From this inadequacy of analysis springs that mixture of terminology in which we find him talking in a single breath of pleasures, interests, legislation, and law.

Having attempted to explain the social area of his view by a simple extension from the first category, Bentham found himself in an embarrassing position with regard to the formulation of a principle for the facts indicated by Social Group. He makes a distinction between private and public and goes so far as to include other persons, and even animals, in the consideration of

¹Bentham, Fragment on Government, chap. 1, sec. 11.

ethical duty; but there remains the disturbing problem of how to manipulate the adjustment of private pleasures and pains within the social complex: "By what obligation can he be bound to obey the dictates of probity and beneficence?"¹ This, by the way, is a tacit admission that the principles of probity and beneficence are not explicable in terms of the physical category. Bentham is here granting that there is a specific area of social fact, but he cannot define it, for he has adduced no proper methodological category; rather, he insists upon the description of interests in terms of the first category. The manner in which he chooses to escape this dilemma is, from the utilitarian point-of-view, not commendable:

In answer to this, it cannot but be admitted, that the only interests which a man at all times and upon all occasions ^{is} sure to find adequate motives for consulting, are his own.²

That is simply a restatement of the principle of the first category and suggests no answer to the problem of conflicting interests at the social level, which Bentham well realizes, for he goes on to add weakly:

Notwithstanding this, there are no occasions in which a man has not some motives for consulting the happiness of other men. In the first place, he has on all occasions, the purely social motive of sympathy or benevolence: in the next place, he has, on most occasions, the semi-social motives of love of amity and love of reputation. The motive of sympathy will act upon him with more or less effect, according to the variety of circumstances, principally according to the strength of his intellectual powers, the firmness and steadiness of his mind, the quantum of his moral sensibility, and the characters of the people he has to deal with.³

Bentham never explains whence are derived these "social motives," nor how a "quantum of moral sensibility" is measured, nor how "characters of people" are to be measured in terms of his physical analysis; but despite this tentative excursion into the social area, Bentham proceeds, immediately following the above quotation, to a discussion of legislation as deriving from what he has called "private ethics," ignoring the implications of his assumptions just stated.

After noting Bentham's attention to method and the systematic structure of analysis, it is disappointing to find him searching for premises among the hopeful affirmations of wishful think-

¹Bentham, Principles of Morals and Legislation, p. 313.

²Ibid.

³Ibid.

ing. The theory of good-will as the primary force observable from the Individual point-of-view is contradictory to all that Bentham has affirmed concerning pleasure-pain, interest, and utility; yet it is upon the back of this straw-man that he places the burden of his argument, and simply because he failed to examine interests as existing in their own right and domain.

The first law of nature is to wish our own happiness; and the united voices of prudence and efficient benevolence, add--seek the happiness of others--seek your own happiness in the happiness of others.¹

I doubt that Bentham could have felt very proud of this restatement of the Christian gaining-by-losing paradox, and his term "efficient benevolence" is more suggestive of policy-honesty and fire-insurance-salvation than of philosophical analysis. The assumption of good-will does not follow from any argument Bentham has adduced; nor does it follow from his method that "of all these motives, good-will is that of which the dictates, taken in a general view, are surest of coinciding with those of the principle of utility."² Certainly no such judgment follows from an observation of the first category of pleasure-pain determination. The pious assurance that "the dictates of utility are neither more nor less than the dictates of the most extensive and enlightened (that is well-advised) benevolence"³ is not helpful in consideration of the fact that we have not yet learned what constitutes "benevolence." If it is a pleasure-pain determination, then Bentham has taken us for a ride on a moral merry-go-round.

Bentham's hesitant admission of the social category is illustrated further in his statement of sanctions. In the Frag-ment on Government (1776), he states three: political, moral, and religious.⁴ These indicate, respectively, circumstances of punishment, society, and a Supreme Being. The moral sanction is definitely a recognition of the social, for Bentham really prefers the term "popular" to designate it. Four years later, in An Introduction to the Principles of Morals and Legislation (1780), four sanctions are listed, the addition to those above being that of physical, referring to circumstances of nature. Dumont (1802)

¹Bowring, Deontology, I, 17.

²Bentham, Principles of Morals and Legislation, p. 121.

³Ibid.

⁴Chap. v, sec. 7, note.

likewise lists four, defined as above; but Bowring (Deontology, 1834), probably following the list in "Logical Arrangements,"¹ sees fit to add a fifth, the social or sympathetic sanction. This he defines as "a sort of mixture of the selfish with the social regard,"² while retaining the other four, including the moral or popular sanction. The addition of the moral sanction was itself a significant gesture toward the level of Social Group, for Bentham himself says it is better "termed popular, as more directly indicative of its constituent cause."³ In another of his logical lapses, he hesitates to use the expression "public opinion" here, because it exercises influence over action only "through the medium of the affections and the will."⁴

This insistence upon returning to terms of the first category of Physical Man to analyze observation to which that category is not immediately relevant becomes somewhat tiresome and irritating. Even after this clear indication of the inadequacy of the first level principle, Bentham once more reiterates it as an explanatory principle for the entire Individual point-of-view: "the question is not, Can they reason? nor, Can they talk? but, Can they suffer?"⁵

This stubborn refusal to admit a methodological advance to the second category of analysis led Bentham into another impasse in regard to a problem so pertinent to the field of legislation that the anomalous status in which he left it well-nigh vitiates the whole of his thought. Having but casually noticed that communication is the specific function of the social level, what will Bentham do about that most important technical problem--representation? Remember his statement: "Every man is not only the best, but the only proper judge of what, with reference to himself, is pleasure, and what pain";⁶ and the further qualification of legislation: "private ethics has happiness for its end:

¹The Works of Jeremy Bentham, ed. John Bowring (Edinburgh: W. Tait, 1843), III, 290.

²Bowring, Deontology, I, 90.

³Bentham, Principles of Morals and Legislation, p. 25, note.

⁴Ibid.

⁵Ibid., p. 310, note.

⁶Bowring, Deontology, I, 59.

and legislation can have no other."¹ If happiness, the end of both man and society, is defined in terms of pleasure-pain, as it most decidedly is, then what reason or excuse is left for the existence of any government at all? As a matter of fact, Bentham does not trouble to justify the existence of government, as he is clearly obliged to do on the basis of his own developed point-of-view:

The idea of government, it may be observed, is introduced here without any preparation. The fact of its being established, I assume as notorious, and the necessity of it as alike obvious and incontestable.²

But is the necessity of government so "obvious and incontestable" from the Individual point-of-view? It most certainly is not if that view can adduce only the principle of pleasure-pain determination, for in terms of government this spells anarchy. Bentham rests his case upon the "greatest happiness of the greatest number" formula, but how determine that "greatest happiness"? The fallacy in supposing it to be merely an aggregate or sum of individual pleasures must have become evident to Bentham, for Atkinson (English translator of Dumont) says that Bentham dropped the "greatest number" and simply stated "the greatest happiness" as representing the true object of morals and politics."³ But who decides what is the greatest happiness of a society or government composed of men whose happiness is determined by pleasure-pain which only they, as individuals, can evaluate?

The Platonic escape is never real as an alternative for Bentham; his English spirit revolts against the suggestion that the legislator actually constitutes himself a guardian or dictator of happiness, deciding for the people what is really best for them:

Nor is any man now so far elevated above his fellows as that he should be indulged in the dangerous license of cheating them for their good.⁴

One of the nine pretenses of legislation which Bentham describes as "despotism" is the claim of the law-giver to be of the number of the Elect: now God himself takes care to

¹Bentham, Principles of Morals and Legislation, p. 313.

²Ibid., p. 214, note.

³Dumont, op. cit., I, 121, note.

⁴Bentham, Fragment on Government, chap. 1, sec. 37.

inform the Elect what is right: and that with so good effect, and let them strive ever so, they cannot help not knowing it but practising it. If therefore a man wants to know what is right and what is wrong, he has nothing to do but to come to me.¹

On the other hand, what does it matter whether the ballot of election be cast by God or by one's self, so long as a single ballot decides the issue? Who elected Bentham to define happiness for men, to mete out their punishment, to design their statutes, codes, and penitentiaries? The plea of expertness will not suffice, for there is no expert in pleasures and pains save he who enjoys or suffers them. Of the real problem of representation--communication--Bentham had little to say. Certainly, in this respect, his democratic sentiments suffered some limitations; for he would have placed restrictions upon the privilege of franchise, in one instance denying it to women, in another deciding they might deserve it.² Whether or not the people are going to like, obey, or resent his laws is a problem which apparently caused Bentham no worry. Yet he has agreed that "it is their duty to obey just so long as it is their interest, and no longer."³ Bentham has indeed set for his legislators a task presumptuous of the Elect in expecting them to design laws which will be obeyed because they acknowledge and sustain the interests--i. e., the pleasure-pain determinations--of each individual upon whom such laws impinge.

Not to court fatigue by emphasizing further Bentham's illustration of the difficulties incident upon a confusion of levels of analysis, let us note in a more general fashion the possible integration of the Individual point-of-view as suggested by Bentham's analysis taken as a whole. He began, as we have said, with the assumption that the happiness of men is the only justification of government, and his originality in this respect consisted in his refusal to accept a vague, indeterminate abstraction as a substitute for happiness defined and implemented in terms of the actual individual. Bentham was justly sceptical of principles of government so far removed from the individual as to appear meaningless in relation to any and every particular individual. To the end of achieving this happiness, he postulated

¹Bentham, Principles of Morals and Legislation, p. 18, note.

²Dumont, op. cit., I, 106, note.

³Bentham, Fragment on Government, chap. 1, sec. 43.

Utility as the principle of activity described from the Individual point-of-view. Let us say, then, that Utility became for him the principle of definition by means of which the Individual was to be defined in the process of legislation and government. Utility is the only ground upon which legislation can be justified.¹ Utility was hence a methodological category, a means of achieving the integration of fact pertaining to the Individual and of securing his greatest possible happiness.

Utility is not a Law. For utility is but a quality, a property; a property an act has of increasing happiness. . . . A dictate of utility is not a law. For a dictate of utility is but somebody's opinion that there is utility in a certain mode of conduct.²

This is a very nice statement of utility as a methodological device to be employed by the legislator, but it leaves unanswered the interesting and pressing problem of motive and justification. That is to say, the mere statement of a methodological category has analytic value, but no moral or political significance beyond that of suggested technique.

This raises one of the most important questions involved in any attempt to state a methodology of activity. The fact adduced in support of any point-of-view must be integrated, or else there will be points-of-view within points-of-view; and Bentham proposed an integration of the observation of the Individual point-of-view on the basis of the methodological category of utility. But why utility? Why not efficiency? or progress? or salvation? or any of a dozen other possible principles? In other words, what motive or reason lies behind the selection of a category to integrate the analysis of any point-of-view? Is such a selection determined by the point-of-view itself? If so, then Bentham has not established his case for utility. His attempt to evade the question by identifying utility with pleasure-pain we have seen to be inadequate and inconsistent to his premises. Neither pleasure-pain nor interests nor utility constitute a sufficient ground of selection; they are categories or techniques of method, analytic operators, methodological categories--call them what you will, they are not determinants of activity until given the impetus of motivation. To define these categories as desires is simply an

¹Ibid., chap. iv, sec. 40.

²Dumont, op. cit., I, 1, note.

escape mechanism; for while desire is indeed an adequate--in fact the most general--statement of motivation, it is by no means identifiable with these categories. One of the persistent facts of political activity is the conscious denial of interests, of pleasures, and certainly of utility, and this very denial may indeed become the means whereby the Person achieves integration in situations of political conflict. Method actually does nothing; it is a means of getting something done.

This is the point at which we must return to a consideration of ideological rather than methodological principles. The principle of integration which is chosen to coordinate the analysis of any point-of-view does not appear capable of derivation from the factual analysis of that or any other view. It is a matter of choice, of taste; it is, as we suggested in the previous chapter, an ideological determination. Certainly, analysis places limitations upon what principle can be chosen; but within limits defined by method and analysis, there seems to be always a more or less extensive range of alternative possibilities. This is not so happy a state of affairs as if we could argue that once having defined an adequate method, integration simply awaited the observation and analysis of fact. Whatever adequacy of analysis may be attained, the choice of a principle of integration for any point-of-view of fact will remain--a choice. It is then correct to refer to the motives which determine the selection of analytic points-of-view as principles; in so far as these principles give direction to the methodological categories, a coordination of principles and practice is attained.

The principle which determines the integration of his Individual categories is for Bentham the principle of Freedom, expressed in the practical or defining concept of Utility. The purpose of private morals and ethics is to assist man in achieving the greatest degree of happiness, and the end of legislation must be no different. The distinction between private and public is a real one, for legislation functions only through the motivation of punishment. It is, then, from Bentham's point-of-view, essentially a negative check. Without presuming upon a fuller description of Bentham's construction of Law, let us note his emphasis upon Freedom and liberty.

Legislation is designed primarily for the punishment of actions which would render difficult or impossible the attainment

of happiness by the majority of individuals within the political organization. It is thus a negative assurance to them of freedom, the guarantee of an opportunity to achieve and maintain the highest possible degree of integration through the operation of the method dictated by their private morals.

Liberty is neither more nor less than the absence of coercion The idea of it is an idea purely negative. It is not anything that is produced by positive Law. It exists without Law, and not by means of Law.¹

No restraint should be imposed, no power conferred, no coercive law sanctioned, without a specific and satisfactory reason. There is always one reason against every coercive law, and one reason which, were there no other, would be sufficient by² itself: it is, that such a law is restrictive of liberty.

Bentham was not unaware of the fact that liberty was insufficient to ground law; and his failure to maintain but one point-of-view in observing fact forced him again into flat contradiction.

I have ranked 'equality' among the objects of the law. . . . Some persons may be surprised to find that 'Liberty' is not ranked among the principal objects of the law. But, if we would avoid confusion, we must regard it as a branch of Security.³

That security and equality are valid principles, I should like to agree; but they are not the ideological motivations of Bentham's analytic point-of-view. The method of Individualism is an attempt (successful in my opinion) to document the principle of Liberty. The casual observation that equality and security are equally valid principles is an interesting ideological comment from Bentham; but it adds only confusion to his analysis and method when he tries surreptitiously or by force to attach these alien principles to his point-of-view. Individualism gives ideological lip-service to equality and security, but leaves them suspended in this ephemeral realm without factual documentation or methodological integration.

¹Ibid., I, 125, note.

²Works of Jeremy Bentham, I, 300.

³Dumont, op. cit., I, 124-5.

CHAPTER V

THE CORPORATISM OF E. JORDAN

It is customary in this kind of presentation to rely for illustrative material upon men and works which afford the benefit of historical perspective. Such perspective may well tend to encourage discretion; but too great a distance may change perspective into obscurity. The democratic environment offers no suitable example of Corporate theory which would meet, as did the work of Bentham, the requirement of age without sacrifice of vigor. Corporatism is not indigenous to democratic soil; it has come to attention by impact, not by choice. The Corporate tradition has flourished in atmospheres not peculiarly democratic, and for the purposes of continuity it appears advisable to select a contemporary work which is oriented to democratic thought rather than to attempt the difficult and extensive job of translating terminology, tradition, and temperament. I am of the opinion that any orientation of continental Corporate theory within democratic structure could be accomplished only by a thorough remodeling of that theory; even if this were accomplished, it would neither serve the present purpose nor continue the demonstration of the manner in which the analysis was originally constructed.

Within these limitations, the most comprehensive analysis of the Corporate view of political meaning is that undertaken by E. Jordan; one might even say that Jordan's statement of Corporatism is unique in the philosophical speculation of the United States. The nature of the work is such as to justify the assumption that Jordan will most likely reflect whatever is significant for our purposes in the structure of traditional Corporate theory. This statement of the Corporate point-of-view will not be directly analogous to Bentham's observation of the Individual, for Jordan does not begin with a primitive category and employ henceforth the simple method of extrapolation. The method to be described here is that peculiar to the integrating category of Institution, and what is implied concerning the categories of Nature and Prop-

erty is largely in terms of their status as integrated factors of the institutional level. In other words, there is in Jordan's observation an implicit structure analogous to that which I have assumed, used by him in the derivation of categories and methods relevant to the Corporate point-of-view. Whereas Bentham evidenced clearly the difficulties of analysis occasioned by a confusion of methods within his point-of-view, the point I shall stress in discussing the Corporate point-of-view is that of confusion between points-of-view. I repeat that the analyses I make here are necessarily selective, with no pretension of evaluation.

The recognition that Jordan's roots were firmly planted in individualistic tradition and that his development has been entirely in the atmosphere of democracy, precludes the inference that he is unaware of the methods and categories of the Individual point-of-view. His concentration upon the Corporate comes as a reaction to over-emphasis upon the Individual, and in his effort to bring to awareness a neglected point-of-view in political speculation, he sometimes neglects what is valid in Individual analysis. The fact that such exclusive emphasis is equally common to both Individualism and Corporatism and is the source of a vitiating dichotomy in the analysis of political fact, explains the concern here with this methodological aspect to the neglect of the important factual content of both Bentham and Jordan.

Thus we find that Jordan grants the existence of "classes within the real," one of which "may be called the class of personalities";¹ and we find that he likewise makes a triadic division of personalities into objects, human personalities, and institutions.² From the standpoint of methodological emphasis, this appears to be a primary confusion of analytic point-of-view; but from our own premises, it must be admitted that the best method is that which best suits the facts to be observed. It may be that the method implied by Jordan's categories is more adequate than that which I have used, or at least, it might argue greater competence and relevance in the explication of a particular point-of-view. That is precisely the question we are concerned to in-

¹E. Jordan, Forms of Individuality (Indianapolis: Progress Publishing Co., 1927), p. 327.

²Ibid.

vestigate. There is, however, one thing upon which too great emphasis cannot be placed: namely, that no method, regardless of its point-of-view, can legitimately disparage what is fact for another equally valid point-of-view; and the Individual and the Person we have already found to be observable categories of the Individual point-of-view. We must admit the same status to the Corporate categories, whatever they may prove to be; but exclusive concentration upon the Corporate point-of-view has the result of obfuscating Individual categories.

Jordan grants at the outset that Person is one of the integers with which ethical and political speculation must be concerned; and in his first published work¹ he undertakes a redefinition of personality and individuality in terms suitable to his emphasis. The definition of Person in terms of the categories of the Individual point-of-view is criticized as a "material contradiction"; and utilitarian analysis is characterized as "tool-philosophy."² We note here an immediate emphasis on the failure of individualistic analysis to recognize the "material" factors present in political meaning, and Jordan sets himself to the task of explicating these neglected factors. He endeavors at the same time to make it clear that this Corporate emphasis need not imply a denial or neglect of valid Individual categories:

It is true that the individual man holds some kind of peculiar claim on the relations which obtain between him and the things and persons with which they at the other end connect. The individual can claim that these relations are his, and that they proceed out of his very being as an individual.³

This appears to be a decisive statement of the methodological distinctions implied in the recognition of analytic points-of-view; and it likewise conveys the important admission that relations exist both between and within these points-of-view.

It must be admitted that the material analysis of the Corporate point-of-view has a claim of relevance equal to that of the Individual point-of-view; but to contend that

this inward turn of such facts toward a central unity, while it constitutes perhaps the most important aspect of the facts, in the matter of the understanding of the practical life may, nay, must, be largely ignored⁴

¹E. Jordan, The Life of Mind (Indianapolis: C. W. Laut and Co., 1925).

²Ibid., p. 268.

³Ibid., pp. 271-2.

⁴Ibid., p. 272.

is to belie the parity of significance through which alone the integration of points-of-view is possible. How can that which is "most important" be of so little significance in the area of political meaning as to justify this cavalier "ignoring"? If it is meant here to suggest the necessity of a dichotomy between the individual as such, and the individual as a part of the political or "practical" complex, then what is being proposed is that although existence and fact may indeed be observed from three points-of-view, political meaning can at most comprehend but two of these points-of-view. That there is a conflict of public and private in the integration of the Person, we have already admitted; and that there may be conflict involved in any possible integration of Person, Institution, and Law, we stand ready to admit; but conflict, in analysis as elsewhere, is not resolved or adjusted simply by ignoring or eradicating one or more points-of-view which appear not to be immediately relevant. If it is necessary, in order to justify observation and analysis from the Corporate point-of-view, that cognizance and credence be denied the categories of the Individual point-of-view, then political speculation is not rational analysis, but simply a process of "choosing up sides" and waging incessantly a war of theoretical armament. That Jordan implies such a diremption of analysis, with a preponderance of emphasis upon one point-of-view, is suggested more directly:

Human relations are not intelligible when interpreted in terms of the persons involved, but must be considered by themselves and as if they were real when they do not hold between persons at all.¹

With the contention that nothing is intelligible taken out of context of the whole of meaning within which it occurs, I should of course agree--observing, however, that since the whole of meaning is the whole of everything possible, this simply implies that apart from divine omniscience, we must accept degrees of "truth and reality" and meaning. Furthermore, it is not clear why the wholeness of intelligibility and meaning which is denied to particular and specific facts of analysis should be attributed to particular and specific relations:

These relations stand on their own feet, are real by themselves, and can be described as such.²

¹Ibid., p. 274.

²Ibid., p. 275.

We have already noted the fallacy present in a confusion of the categories resulting from analytic or methodological distinctions with the real or objective nature of the factual complex.

Moreover, it is difficult to talk about relations, however self-sufficient, without taking into consideration what they relate; and we find that Jordan is holding in reserve a substitute anchor of relationality, a new category of personality:

there must be another person hidden somewhere which we have not seen. . . .there is a superpersonal person involved in every practical relation, whether that relation be selling a carrot or saluting a saint.¹

We cannot but suspect at this point that here is a somewhat surreptitious translation of Person into terms of the Corporate point-of-view; and in terms of Corporatism, this new category of personality should be called an Institution. The correctness of this suspicion soon becomes evident:

Each of these essentially human, and therefore personal, qualities creates its own appropriate objective form, embodies itself as soul in this form, and thus helps to make the enduring realities of life. . . .These embodied souls of the mind-life we call institutions.²

The nominal recognition of Individual categories throughout Jordan's work operates to little effect if the implications of those categories are always to be translated into concepts not suitable to express their meaning, concepts which are rather the particular analytic media of the Corporate point-of-view. The justification adduced for this restrictive emphasis upon analysis in Corporate terms and categories is not convincing:

The essential fact of the practical life is that it is constituted entirely of outside relations to and among persons and things.³

I am not at all clear as to what is meant by the description of a relation as "outside." Without becoming involved in the logical argument of internal and external relationality, it seems not too naïve to ask how a relation can be considered as "outside" the point-of-view from which it is observed. When we speak of relations "within" and "between" points-of-view, we are referring to methodological devices of abstraction; but a relation as "outside" is still something else. If it is contended that relations exist independently in the areas between or outside the analysis of points-of-view, then we have postulated a final separation of relations and the analytic concepts which they relate, which appears

¹ Ibid., p. 275.

² Ibid., p. 286.

³ Ibid., p. 274.

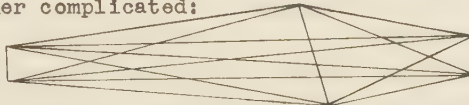
to me a suicidal destruction of the very concept of relation. The minimum of content to be ascribed to the term "relation" is that it implies connection and continuity at both ends. As for the contention that "when we examine these relations as flowing from the spontaneity of any person, that person ceases to be a true and real person,"¹ I submit that while this may well be the case, it is hardly legitimate to present this dilemma as the only alternative analysis of facts and relations to that of "outside relations." That this statement of the independence of relations is not actually descriptive of Corporate analysis is evident from the postulation of the inherence of these relations in Institution, which Jordan chooses to call Person.²

¹Ibid.

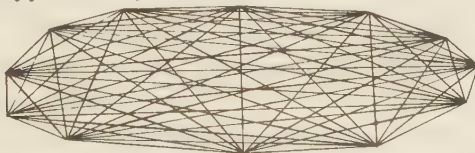
²This problem of relations is not easy; and there is no intention here of undertaking an extended discussion; but one comment is indicated in regard to its methodological implications. Let us, for the purposes of illustration, assume a meaning-complex in which four terms or concepts are involved. The situation as a whole would present a configuration something like this:



Now suppose that two additional integers are added, and the matter of position or relevance is taken into account. The pattern begins to become rather complicated:



Six integers is a mere pittance, however; too few even to convey the characteristics of a meaning situation. Let us begin to approach actuality, and try twelve:



This kind of a "mess" is precisely what is presented by the relations of any meaning or practical situation, except that it will be rendered infinitely more complex by the continuity and possibility of additional integers. Furthermore, what we actually meet in problems of analysis is not such a precise configuration, but a mere segment of the whole pattern:



Such illustrations may appear unsophisticated; but philosophy begs for such naïvete when one hears an apostle of simplicity state publicly: "The problems of social activity and relations are

Jordan's analysis is clearly an attempt to describe individuality and personality in terms which will make possible their implementation. Jordan sees clearly what individualistic tradition never saw, that in the absence of such implementation, individuality and the individual remain hypothetical abstractions with little or no implication of meaning for political analysis. What appears questionable in Jordan's procedure thus far is the assumption that such implementation is to be accomplished by reducing the category of Person to terms of the Corporate point-of-view. This necessitates, by omission if not by admission, the denial of any legitimate point-of-view which might be called Individual. A later consideration of "The Institutionalized Mind"¹ starts from the premise that "specific meaning" is a contradiction in terms, a proposition with which full agreement has already been expressed here. The corollary that "no meaning can ever be attained by putting facts together"² is legitimate as referring to the specificity and inadequacy of products of analysis; but to infer from this methodological statement the factual observation that "thus the content of mind is external to the mind";³ and to proceed from the observation that "so-called individual interests are then really personal interests," to the conclusion that these "individual interests when seen whole, are the functional relations of institutions"⁴--this is to confuse the status of fact with the methodology of observing the fact. It appears to ignore the contribution of Kant and Bradley in their emphasis upon the functional contribution of the process of knowing, their insistence that what is known is not simply fact, but fact-as-known. Observation attests the social nature of mind, knowing, and activity; institutions are determining factors in political meaning. But the legitimate criticism of individualistic point-of-view analysis, that "in the absence of institution. . . man appears executively impo-

not difficult; they can be reduced to three: the relation of husband and wife, the relation of parent and child, and all other social relations." A more adequate method than mere assertion seems indicated if any progress is to be made toward unraveling the complexity of fact which constitutes meaning. Let my diagrams then suggest the necessity of a structural analysis, as well as to point out the extreme difficulty of considering relations as real in isolation from analytic points-of-view.

¹Jordan, Forms of Individuality, chap. iv.

²Ibid., p. 238.

³Ibid., p. 157.

⁴Ibid., p. 167.

tent in all practical connections"¹--is hardly the ground for a polar segmentalism which says that

it is the outward life-processes which determine the make-up of his mind, and not he that controls conditions;²

or the extreme statement that man

neither as individual nor collectively, is responsible for the organization of human affairs into such bodies as an industrial corporation, nor is he capable of controlling them or of determining the direction of the line of policy which they will follow.³

That Jordan recognizes the individual as active, as in fact the motivator of activity, makes the more significant his continuing failure to accord proper recognition to the facts of Individual analysis, for it indicates the primary importance of a method of observation which will take into consideration all of observable fact. It is repeated many times that the

individual's obligation is the obligation to know; to prepare in idea and anticipation the intent of the whole of experience which as objective agency may become active in the execution of a plan;⁴

but at the same time it is taken as a premise of significant political action that

the merely being an element in the structure of institutions does not lay the ground for the effective action of the intelligence of men in controlling or even affecting the life of institutions in any considerable degree.⁵

This poses the question of how intelligence can possibly make itself effective in activity.

The motive which lies at the root of this almost exclusive concentration upon the analysis of the Corporate point-of-view is the assumption that corporeity is synonymous with the possibility of order in the political structure:

¹E. Jordan, Theory of Legislation (Indianapolis: Progress Publishing Co., 1930), p. 231.

²Jordan, Forms of Individuality, p. 175.

³Jordan, Theory of Legislation, p. 231. No one emphasized more forcefully than Hegel the Corporate point-of-view, and yet he realized and stated clearly that to extend into analysis of the individual these categories of autonomy derived from observation of Corporate evidence would simply result in the deterministic inhibition and circumvention of any possible activity. Cf. Hegel, Philosophy of History.

⁴Jordan, Theory of Legislation, p. 228.

⁵Ibid., p. 77.

The essence of individuality is corporeity, for this is the ground of the possibility of order, and the purpose of science is to examine and explain the forms of corporation, and the laws by which these forms are incorporated.¹

It is not clear to me why there should be supposed more order present in the integration of Institution than in the integration of Person. They represent analogous categories of two different points-of-view; and while it is quite true that no construction of political theory can completely ignore either category, there is no ground upon which either should take precedence over the other. It may be true that

it is the more or less blind pressure of institutions upon the life of individuals that is responsible for very much the larger part of his activities;²

but does it follow from this that "it is these pressures that constitutes the real content of political action"?³ They are not more real simply because they are the only real factors; this would spell institutional determinism, and circumvent any activity that could be called political. It can hardly be contended that the area of individual activity is confined to the speculative, that is, to understanding the process by which institutions determine the activity of the speculating individual; and Jordan appears in no wise averse to admitting that in the

administrative motive of legislation, the individual is pre-supposed in his capacity to think and to idealize ends, but his character of peculiar importance here is his capacity to act. By action here also is meant the bringing about of changes in the order aspect of objects, the capacity to change objects in such of their attributes as quality, position, etc. . . . The individual thus as a factor in the administrative aspect of legislation is important because of his relation to the changes in the order of objects which legislation effects.⁴

Such a statement of the possibility, and necessity, of individual activity within the political arena certainly designates a very "real content of political action" over and above that exerted by the factors peculiar to the Corporate point-of-view.

It would seem then that order, in the sense of political meaning, is not the exclusive prerogative of the Corporate point-of-view, nor that the individual has only the alternative of maintaining a passive state while

¹Jordan, Forms of Individuality, p. 187.

²Jordan, Theory of Legislation, p. 76.

³Ibid.

⁴Ibid., p. 379.

the institution, when operating as a creative agency, transmits or extends its elements of order to the system of objects produced by individuals at natural agents, thus incorporating these orders of exclusive objects into cultural ends, or the ends of civilization.¹

The function of the individual cannot be restricted to that of producing objects, for it is clear that the Institution does not function as a "creative agency" except through the activities of reflection, speculation, and experimentation--and the agency of these functions is the Individual. Jordan recognizes this when giving a summary statement of the "constitutional principles of order which become explicit in organisms of the natural and social types":

three main forms have appeared as fairly clearly definable. These are the speculative principle, the experimental principle, and the reflective principle.²

How any of these principles can approximate implementation without implying specific activity on the part of the Individual is a question which Corporate analysis must answer.

There is one possibility which should be noted, namely, that the order which Jordan conceives to be the essence of corporeity is meant also to be identified with mind or intelligence itself. In some respects, this seems to be the implication of the above references, and it is supported in numerous other observations:

The human mind is then the unity of order in the institutions of life. And the degree and worth of that inner order of mind will depend upon the type and quality of order that can be set up in the complex of those institutions;³

There is no means of effecting changes in the mind of the individual person except through changes in the external and objective forms which his mind takes in property, etc.⁴

It is this presupposition of a natural, divine, or metaphysical order as providing the ground of law, both civil and moral, which has been largely responsible for the neglect by democratic speculation of the suggestions contained in traditional Corporate theory. Jordan likewise fails to establish any real possibility of relation between an individual as agent and an institution as order; but he is apparently unwilling to reflect the disdain of

¹Ibid., pp. 87-88.

²Ibid., p. 464.

³Jordan, Forms of Individuality, p. 180.

⁴Ibid., p. 309.

agency which is common to extreme Corporatism. Rather, it is the recognition that agency cannot be a characteristic of the isolated individual of individualistic analysis that drives him to a reformulation of the concept of agency; and once again we find a suggestion of the levels of analysis which we have formulated here.

One of the original, natural things which lie embedded in the foundation of the practical life, and constituent to the corporate political body as one of its units, is the natural person, the human individual.¹

The individual assumes meaning, however, only when observed as a higher order of fact--that is, as a Person; and

the concept of person, in its lowest terms, is essentially the comprehension of the unity of things as occasioned by their circumstance; it is the idea that the simplest elements of order in a body of things implies the inclusion within the order of the facts which circumstantiate that body.²

This is, in its generality, essentially a definition of what we have indicated to be the integrating category implied by the analysis of any point-of-view. Such comprehensive categories serve to provide social and political speculation with definitive concepts which comprehend the essential observation of respective points-of-view. That Jordan should choose to call this integration itself "personality" seems unfortunate, for it indicates a dual confusion of structure and content, as well as a failure to recognize Person as a legitimate category of the Individual point-of-view. While he is critical of the confusion of points-of-view in analysis by analogy--

the characteristics which we attribute to the social body in the more or less careless analogy we make between it and the human being, especially with regard to the human being's capacity to formulate ends, endows the social body with a good many capacities for the existence of which we can find no objective evidence whatever³--

yet this appears to be precisely what Jordan is doing when he defines the Institution as a Person, and attempts to justify this characteristic of personality by ascribing the function of will to the institutional or corporate entity. This deliberate fusion of two analytic points-of-view is the source of an elaborate identification of Individual and Corporate categories for which it is doubtful that "any objective evidence whatever" can be adduced. At times, the identification appears contrary to any possible an-

¹Jordan, Theory of Legislation, p. 290.

²Ibid.

³Ibid., p. 322.

alytic observation:

there is no essential difference between the corporate or fictitious and the natural person;¹

The corporate body. . . . is to be considered in every way a reality of the same order, principled by the same law, differing from the natural person only in degree.²

Regardless of the context in which such statements may have been made, they indicate a cavalier refusal to accept any point-of-view in analysis except the Corporate.

In logical terms³ it would be equally justifiable to eliminate the mediate and the intermediate processes of knowing, and to define inference and judgment solely in terms of immediacy. Logical distinctions in methodology demand that the three analytic points-of-view be distinguished and accorded equality in regard to meaning. If this analytic distinction is not maintained, then the political process becomes something decidedly less rational than the compromise to which Jordan objects so heartily. It becomes, in fact, something comparable to what is left of knowing when mediate and intermediate are reduced to immediacy--mysticism. The difficulty set by the fact that mediate, immediate, and intermediate aspects and functions appear inextricably mixed in any actual situation of meaning or activity does not provide a sufficient answer to the persistent demand for some clarification of the individual's status as agent within that process. To call an Institution a Person, and to fabricate a will with which to endow this personality, is simply to make impossible any adequate comprehension and coordination of either Individual or Corporate categories. It is largely upon this aspect of the will-nature of corporations that Jordan bases his attribution of personality to such entities. The manner in which this development is accomplished provides an interesting example of the way in which meaning may be restricted by the method of a point-of-view extended beyond its observational limits. The individualistic premise that will is the practical manifestation of the observable tendency to self-realization through growth is accepted; and this suggests that any analysis of individuality must issue in a theo-

¹Jordan, Forms of Individuality, p. 129.

²Ibid., p. 309.

³Cf. Appendix 11.

ry of will.¹ It is then stated as a matter of observation that the isolated individual does not manifest all the fact necessary to this self-realization. In other words, the adequate fulfillment of will demands an integration not comprehended by the categories of Physical Man or Social Group.

And the corporate or civil is the full form of individuality because it embraces referentially all the fact and at the same time is characterized by all the typic or generic forms of order.²

That this should imply, however, that "will is then merely the propulsive tendency to order in fact, or the fact that fact can exist only as ordered,"³ does not seem to follow directly. The mere fact that the tendency, propulsion, urge--whatever it may be called besides simply will--which is characteristic of the nature of the individual should necessitate and demand for its incidence and fulfillment a range of fact which is external to the individual considered merely as a Physical Man, does not necessarily imply anything so drastic as the negation of the original tendency or propulsion manifested by the individual. It appears that this extension rests upon a confusion or identification of will and activity, of motivation and accomplishment, of purpose with practice. If I will to construct a table, for instance, it is certainly true that the manner in which I construct the table--that is, implement my will--must to a large extent accept determination by the nature of available material, and other material considerations such as use and workability. The activity itself must be adapted to these material factors; but the will to make a table remains just that--the will to make a table; and if that will is thwarted in activity by a total absence of material possibilities, it yet remains a will, and as thwarted, it may occasion a degree of disintegration rather than the anticipated satisfaction of self-realization. There is every intention of maintaining here the critical attitude justifiably demanded by Jordan toward the hopelessly inept statement of will made by individualistic analysis; but the deterministic picture of the relation involved between Individual and Institution does not account for all observable facts, one of which is the characteristic of will or agency manifested by individuals as individuals. Individuals can and do, upon occasion, deny any or

¹Jordan, Forms of Individuality, p. 148.

²Ibid., p. 234.

³Ibid., p. 237.

all of the pressures exerted by corporate or institutional factors. It may mean suicide--physical, intellectual, social, or spiritual; but the fact remains that this is a prerogative of the individual, and it is not conducive to clarity in analysis to deny or to ignore the obvious.

That an Institution manifests any characteristics identifiable with this tendency or propulsion as common to the Individual is doubtful. The term which appears more descriptive of the propulsive tendency of corporate bodies is Autonomy, and this is implied in Jordan's definition of the corporate will as blind and indifferent.¹ As for the possibility of attaining any integration of these two kinds of will defined by corporate theory, let us observe the characteristics of each:

The corporate body which is the practical reality, has therefore a will that is propulsive, a consciousness that is apprehensive and representative, and an intelligence which is incapable of comprehending ends and so of giving it direction. The individual person that is one of its constituents has a will that is ideative, a consciousness that is comprehensive, and an intelligence which postulates the order within which direction is significant. The one creates the rational or the irrational indifferently, it has no ideal or will capacity of choice; the other dictates the rational, but creates nothing. This is the situation which constitutes the problem of political theory, and the difficulty of political practice.²

The distinction of corporate and individual as stated in this passage seems to be that between will as immediate and will as mediate; but inasmuch as will carries the implication of activity, it is better described in a political sense as intermediate, which I take to be acceptable to Jordan. This statement would then be in essential agreement with our original logical designation of points-of-view; and in general it may be said that Jordan is formulating the problem of public and private integration in political activity. But simply to make the distinction on the basis of a different quality of will provides no ground for that integration--unless, that is, the distinction of wills is interpreted as implying a common will-substance; but this is simply another way of reducing will or agency or Individual to the analysis of the Corporate point-of-view.

The possibility that this is the implication of Jordan's

¹Jordan, Theory of Legislation, p. 280.

²Ibid., pp. 280-1.

position may be inferred, not only from previous citations, but from a further clarification of how it is that the individual becomes an agent in the political process. Besides his obligation to think and to know, the individual is admitted to have a "capacity to act."¹ In this respect, the individual is a "manipulator of means"; but note carefully in the very next sentence the restriction placed upon this capacity to act:

And in this capacity we may describe the individual as one among the various instruments of which the public will makes use in the pursuit of its administrative purpose. . . . Hence for the purpose of making the administrative function clear in its legislative implications, it is allowable to treat the individual as an instrument and means in the hands of the public will.²

What precisely constitutes this "public will" which manipulates the individual manipulator is not quite clear. In the first place, there is no possibility of identifying it with public opinion, for Jordan has already said that "there is no such thing as public opinion."³ It is that peculiar kind of intelligence which is "incapable of comprehension," and in no way analogous to the ideative capacity of the individual. It is interesting to note that Bentham rejected public opinion because it would imply will,⁴ while Jordan rejects it because it would imply mind. (This seems to me a highly significant comparison, summarizing the essential distinction of analysis between the two points-of-view.) Public will is defined as representing the characteristics of "continuity" or order manifested by any and all corporate entities, and would therefore be typical of institutional forms. It is, moreover, the "integrating tendency in public life," and as such it appears to be a natural or inevitable accompaniment of the association of fact. Further, "this will effects a perfect continuity with the life of nature beyond the localized area," which means that the primary problem of political activity is that of "finding appropriate instruments of the public will."⁵

This attributes about the same degree of agency to the individual as might be allowed to a guinea pig on a treadmill. The

¹Supra, p. 59.

²Jordan, Theory of Legislation, pp. 379-80.

³Ibid., pp. 339, 341.

⁴Supra, p. 32.

⁵Jordan, Theory of Legislation, pp. 234-5, 408-9.

reduction of will to the autonomy or continuity of the corporate entity leaves to the individual only his "ideative" capacity; his only agency is that of knowing. This is, in fact, literally to eliminate the individual as a factor of political meaning, for as Jordan himself says,

if recent events in the political world mean anything more than accident it is that intelligence is among the least of the factors that determine the course of the political life.¹

The question is whether political meaning can be made to comprehend anything more than "accident." The restriction of the individual to ideative capacity brings us back to institutional determinism, for it is clear that if mediation or intelligence means anything, it implies some degree of comprehension of all factors in the political complex, and this necessitates the inclusion of activity itself as a constituent element of that meaning. The possibility that any such group as Mannheim's "socially unattached intelligentsia" could exercise their peculiar capacities of speculative discrimination from a position of complete "objectivity" is extremely doubtful. In the first place, no one has shown more clearly than Jordan that to speak of an individual, or an intellect, as "socially unattached" is to speak what is meaningless. The dilemma appears to be final for Jordan: "Man must do his own political thinking, yet cannot; such is the surd of politics";² and this is the inescapable result if the individual is denied the capacity of agent in the political process. Such a reduction of the individual rests upon no ground more cogent than the arbitrary refusal to admit more than one possible analytic point-of-view.

The failure to maintain the categorial distinctions which result from the complementary analyses of points-of-view forestalls the correlation of those various categories in a pattern of political meaning. Peculiarly enough, it was Jordan's emphasis of the Corporate point-of-view as the immediate aspect of the political structure which was the primary source of my own analysis. Clearly, it is the function of political analysis to comprehend all points-of-view; and the Corporate or Institutional must not be ignored because its nature is that of immediacy. From the recognition of such a method of analysis there follows the demand that

¹Ibid., p. 76.

²Ibid., p. 25.

it be incorporated into the structure of political analysis. That democratic theory has failed to attain this comprehensive outlook appears obvious; its method and structure have thus been rendered partial and inadequate; and the point-of-view conflict of liberalism versus totalitarianism is a warfare in which bombs of sentiment and rationalization obscure the issue.

Describing the "ground of experience" as "feeling-mass" Jordan identifies "objective feeling-mass" with "the corporate order of human life as embodied in institutions."¹ More specifically, a

specific instance of feeling mass of life, and as a stage of its objectification into customs, etc. . . . is the thing, the physical or materialized object which, as effective, is a specialized instrument.²

This is a clear statement of the category of Nature in its character of immediacy; but the demand which Jordan seems to feel for identifying Individual and Corporate categories renders somewhat ambiguous the relation between the natural "thing" and the Property object. The principle of Use suggests that the thing "becomes objectified into commonalty through transcending its self-referent privacy"; but that it for this reason should become "the object of exchange as the lowest stage of communication"³ seems a direct contradiction of the defining principle of Use. Upon what grounds can we justify a definition of the natural object as "the ordinary experience ground of mediation between the individual and the social"?⁴ What necessity dictates the use of such individualistic terms as communication, individual, and social group to explain the essential nature of Property? Property is not a means or function of communication. It is, as Jordan says, "arrangement of material or historical objects into abstract form," a passive or at least immediate "form," for Property is then "ready to receive the infusion of influence of life and law which will make it over into a real corporate order."⁵ This seems to indicate that the Individual and Formal points-of-view will coalesce in the Corporate category of Institution, another indication of the tendency to conceive Corporatism as the determining point-of-view in political

¹Ibid., p. 117.

²Ibid., p. 122.

³Ibid.

⁴Ibid.

⁵Ibid.

analysis. Once again, we cannot object to choice of terminology; and if Jordan means by "corporate" to refer to the whole pattern of the political complex, inclusive of all three methods and points-of-view, it is his privilege so to use the term. But we can and do object when that same term "corporeity" is defined as the essence of Institution, the peculiar category of one particular point-of-view. Corporeity is certainly one, but not the only quality of the political complex.

It is not surprising that Bentham had nothing of importance to say concerning Property; that is, he refers to it simply as equivalent to interest, a thing which is created, which must be possessed by some individual. The attempt to implement this uncritical conception of Property in our political structure has been one of the primary sources of our failure to comprehend the nature of corporeity. Until political analysis comprehends the Corporate analysis of Property suggested by Jordan and ignored by economic science, we can expect no proper recognition of natural objects and instruments within activity. There is no point in reproducing here that analysis, except to indicate the general structure of the treatment. As already defined, Property is the embodiment of natural objects as external means;¹ and Jordan makes clear the falsity of the assumed correlation between Property and ownership. Property is thus not a category of the Individual dimension; its relations to individuals are neither direct nor determining. Legal tradition has placed emphasis upon the right of disposal in regard to Property, rather than emphasizing its real characteristic--enjoyment or Use. The rights to Property are not, and could not be, exclusively enjoyed by isolated individuals, excluding of course that legitimate and restricted area of private anarchy which comprehends wives (generally) and toothbrushes (universally), which are properly not Property at all.

Jordan notes again the fallacy of collectivistic logic in calling attention to the fact that "a usage is not the mere sum of repeated uses, nor is it the resultant tendency to act in a specific way which comes from repeated action."² The very concept of Use implies the integration which can be described only in terms of the category of Institution: "Usage then is institution, and

¹Jordan, Forms of Individuality, p. 329.

²Ibid., p. 336.

institution is the objectivity of use."¹ The Institution is thus the corporate form of integration by means of which natural objects, through the coordination of Use, become public or corporate instruments. The implication of this concept of Use and Property is that every natural object and every Property-Use is endowed by its very nature with public reference, relations, purposes, and obligations. Property is a concept which is essentially public because it is only by and through such public instruments as are represented by Institutions that any purpose at all can be realized, or any will implemented, however individualistic that purpose or will may have been in origin. This is what we mean when we refer to social responsibility; but we seldom know what we mean.

The ultimate person who carries responsibility is the whole, the system of human purposes as institutionalized in the public body.²

We are beginning to realize vaguely, in certain connections such as crime, that violent reprisals upon the physical person of offending individuals is neither the cure nor the expiation of the error.

The public or Corporate aspect of every purpose or end or will is then that it can approximate implementation or Construction only by the Use of instruments which exist as Institutions. Not only is "the corporate body the appropriate organ for the expression and realization of public purposes,"³ but since every purpose demands a means or instrument and since such instruments are characteristically corporate in nature, all purposes whatever imply the Institution as their point of final incidence. What must be assured to the individual in any adequate social structure is the availability of these necessary instruments. This is precisely what is meant when we say that abstract liberty divorced from the possibility of exercising that liberty is meaningless. It should be noted that this does not imply affirmation of the principle of Equality, but of the principle of Security. It is not that every individual is to have equal access to instruments, nor that all instruments should be equally available; but that there must be some assurance that ends and purposes can be given actual, material

¹Ibid.

²Ibid., p. 340.

³Jordan, Theory of Legislation, p. 303.

implementation. When an adequate integration is achieved in the Institution, the characteristic Autonomy exhibited by that corporate or public body will give assurance that the material factors necessary to the fulfillment of activity are available.

CHAPTER VII

THE FORMALISM OF LEGAL THEORY

Naturally, I find more than mere coincidence in the observation that legal and juristic theory has developed along three main lines of emphasis. It may be that there exists some close analogy between the fundamental cleavage of legal methods and the three traditional branches of political thought--Individual, Corporate, and Formal; but it is sufficient at the moment to note that legal theory itself divides into three distinct schools of thought, commonly known as the Analytical, the Historical, and the Philosophical. It is to be expected that I would find in these three lines of development an explication of the categories peculiar to the Formal point-of-view: Mathematics, Logic, and Law. It cannot, however, be assumed that this relation is obvious; and for the purposes of analysis, I suggest a brief examination of the method of observation employed by each of these legal constructions.

If there is any relation between the major political and legal traditions, Austinian jurisprudence will parallel the thought of the positivistic or formal school of politics. To Austin¹ must go the credit for recognizing the necessity of a definitive method by means of which to distinguish and define the aspect of meaning with which law or jurisprudence is primarily concerned. The major concern evidenced by Austin in this delimitation of method was that of distinguishing the sciences of jurisprudence and ethics. The tacit identification of these two sciences, as well as of law and morals generally, had already occasioned a reaction on the part of the Historical school of juristic thought, which had attacked the notion of legislation as a positive science. Austin's immediate endeavor was to define, delimit, and specify the exact nature and content of a possible science of positive law or jurisprudence; and the methodological pattern which he constructed fits into our triadic analysis without distortion.

¹John Austin, Lectures on Jurisprudence (London: J. Murray, 1911), 2 vols.

There are, says Austin, three kinds of law: 1. laws of God; 2. positive laws; and 3. positive morality.¹ Laws of God are identified with "laws of nature"; and consequently must be taken as representative of the Corporate analysis. It is true that both positive law and positive morality manifest some resemblance and analogy to so-called divine law, but the relationship is not immediate, and does not establish any relation of dependence among the three kinds of law. (It is interesting to note that on the basis of this explanation, the concept of "God" would be appropriate to a possible metaphysical level of the Corporate view). Positive law is defined by Austin as the setting of the law "by men as political superiors" or "by men, as private persons, in pursuance of legal rights."² In this definition, we may eliminate the latter restriction as precipitating a circular argument; to define law as the execution of legal rights is not explanatory. What Austin means, as indicated by further explication, is "by men as political superiors or by the agents of those superiors." This would seem to imply that the sole source of law lies in some form of vested sovereignty; and such might indeed be taken as Austin's meaning if it were not for the fact that there is a recognizable area of "judiciary law," which proceeds from the execution of the science of jurisprudence, and not from the fiat of political superiors.

The distinction of positive law from positive morality rests upon the separation of private and public sciences of morals. Positive morality includes all the rules of human conduct, organization, and communication which are not established either as laws of God or as dictates of sovereignty. Thus does Austin set off Formal analysis from that of both Individual and Corporate points-of-view.

If Austin is to maintain the separation of powers which his methodological approach implies, and upon which he insisted, then it is obvious that the assertion of judiciary law raises a serious question. From what source can judiciary law be said to derive its imperative element? Austin grants at the outset the essential nature of law as command,³ and seems to admit that such imperative must derive from some established form of sovereignty. But if it is granted that judiciary law reflects this imperative

¹Ibid., Lecture V.

²Ibid.

³Ibid., Lecture I.

which is vested in sovereignty, then judication is no longer to be conceived as operating independently of that sovereign, no matter whether the latter assume the form of legislative activity or executive fiat. Austin would thus fail his primary purpose of establishing the independence of jurisprudence; the judge would simply be an agent of the "political superior," and the Formal would be reduced to the Individual.

Statutory law is admittedly an effort at the precise formulation of legal rules, a formula which will constitute the universal major premise by means of which the legal status of any particular act may be determined by logical deduction. In such procedure, the court acts inductively to determine and establish the fact is the form of a minor premise, evidence. The function of the judge is then that of logical analyst, in that he deduces and formalizes the conclusion in the form of a judgment or decision. On this view, judicial procedure is the mechanical process of drawing inevitable conclusions from general rules and established facts. The statute might be compared to a mathematical postulate, aiming at a degree of abstract generality which will cover all possible instances of particularity; and the judicial process would combine logical deduction and descriptive induction. The fact that the knowledge and skill of those who design statutes is not adequate to formulate such a comprehensive generalization is not a criticism of the procedure as a method. The scientist is never aware of all the fact when he makes his generalization in the form of a "law of nature"; but he proceeds as if his generalization were exhaustive until forced to admit otherwise. Judicial procedure thus bears a marked resemblance to scientific experimentation in the manner in which both make use of the necessary fictive assumption of inductive procedure.

The necessity of this fiction of universality as a methodological device is too often forgotten in criticisms of Analytical jurisprudence. Austin is quite right in rejecting as not to the point criticisms of codification which refer to the inadequacies or failures of attempted codes.¹ Neither is it justifiable to argue that the legislative function is purposive rather than formal, for this assumes that a purpose cannot be given precise formulation. Is there any reason to assume that a generalized,

¹Ibid., Lecture XXXVI.

universal formulation of purpose or policy cannot be drafted? Is not every piece of legislation actually a determination and statement of policy? Even though such precise codification remain merely an ideal, that in itself is not an argument against the method which conceives the judge as interpreter, without legislative or imperative capacity. On this view, judicial rules are principles of procedure, rather than additions to the content or purpose of statutory law; and as such there is no reason why they could not be formulated in precise and systematic manner. As a matter of fact, this is exactly what the judge does in setting a judicial rule; and such rules become the "general grounds or principles. . . .whereon the cases are decided"; and the "process of induction by which the principle is gathered before it is applied" is "this very process of codifying such principles, performed on a particular occasion, and performed on a small scale."¹

That the consistency lent by such systematic codification is not only desirable, but necessary within the political organization, appears obvious. The demand made by law for precedent, for system, and for continuity springs from the same necessity which dictates consistency in language, in numbers, and in every formal system by means of which facts and relations are formulated and communicated. The categories of the Formal point-of-view may then claim a status of validity and necessity equal to those of either of the other two points-of-view, for without the formal structure, there could be no continuity, no judgment, and hence no adequate meaning.

Austinian theory is justified, then, in insisting that law, as the formal rules of social procedure, be given formulation in the most precise, systematic, and consistent form possible. And Austin's analysis has suggested that both legislative and judicial rules are capable of such codification. Further, the Analytical argument appears correct in asserting that failure to achieve perfect codification in no way affects the demand that such a method be employed in formulating judgments about facts and relations. It is probably the case, as Austin claims, that the failure of codes has been "grossly exaggerated." The difficulties of codification have been used to good effect by attacks which seek to find therein an excuse for various forms of judicial

¹Ibid., Lecture XXXIX.

extravagance; but the fact remains that statutory codification is proving highly successful in ever-widening areas of operation. The extension of uniform codes of procedure among the many states of the United States has been extremely handicapped and slow; but it is being recognized as the only available method by means of which to attain any appreciable degree of that consistency and precision in the enforcement--that is, recognition--of law which will make integration at this level possible.

The difficulty with the Austinian analysis, however, lies in another direction; the analogy between judicial practice and scientific procedure will not serve to explain all the facts involved in the judicial process. Scientific generalizations certainly do rest upon the same fiction of universality as do codified statutes; but the manner in which the fiction, and hence the generalized rule, may be subjected to question is entirely different in the two fields of operation. If legal codes could be formulated with the same flexibility, the same ease of adjustment, could dispense with the apparent necessity of imparting to the legal dictum an atmosphere of timeless inviolability regardless of fact--granting this assumption, it appears that codes might be adjusted, redrafted, and maintained as useful methodological instruments in much the same manner as are scientific laws. This is partly a matter of attitude, and to this extent might lend itself to adjustment; but this is not the primary theoretical difficulty involved in the proposal of codified law as the method of observation and analysis from the Formal point-of-view.

Austin recognized that law implied an essential element of imperativeness which was not derived from its formal consistency or structure. No command other than that of internal consistency is required of mathematics or of any formal system as such; and as a consequence, there are usually to be discovered a number of alternative formal structures. The only choice as between these various formal structures is that of selecting the one most useful to the purpose at hand. Thus I select English in which to communicate to a selected group of readers; we select Euclidean geometry to build within limits adjustable to plane figures. The formal structure or system is in no wise determined by the facts; it is simply more or less adaptable to them; and it is unlikely that the coincidence of fact within the structure will ever prove exact. An actual triangle whose angles are pre-

cisely equal to two right angles is not available; actual triangles are observed by Corporate analysis, and the abstract structure of the Formal analysis describes them with a high degree of formalized precision. Certainly, it would be optimistic to assume the possibility of a language expressive of every nuance of individual meaning, for the formal structure of language does not exist within the comprehension of Individual categories, but is adapted to them.

The imperative or command element of the formal structure lies therefore in the internal consistency which the systematic nature of that structure manifests; but this is by no means the case with the legal code. The reason is not that the law may not be sufficiently adaptable to fact and relation; nor is it that the code cannot be so constructed as to manifest a high degree of internal consistency. Further, the difficulty does not arise from the choice offered among various codes or systems of law. Having selected a formal system suitable to the immediate purpose, the imperative of that system should be patent; but the selection of law does not in itself convey any imperative. Legal rules rest upon an imperative derived from some external compulsion, perhaps from a power resident in some form of sovereignty, as Austin admitted.¹ There is implied here a necessary distinction between a logical and an active imperative, which explains why a "logic of imperatives" is insufficient to describe the nature of the legal imperative.² Certainly it is true that the formal system evidences a command element in the same sense as does Mathematics, in that there are exhibited necessary structural relations dictated by the nature of the system; but the necessity derives simply from formal logical grounds. If logical necessity is ignored, we say that the result is "wrong," or more exactly "incorrect"; and it is incorrect simply because it has disturbed or negated the consistency which is the nature of the formal system.

Why, then, can we not say that the act which defies the consistency of the legal code is also "incorrect"; and allow it

¹Ibid., Lecture VI.

²Cf. Morris Cohen, Law and the Social Order (New York: Harcourt, Brace and Co., 1933), p. 256: "A study of juristic logic would be of the greatest assistance in clarifying the relative places of the imperative and the rational elements in law. Logicians have neglected this task because the logic of imperatives has not been developed."

to be sufficient proof of illegality deserving punishment that the act is contrary to the consistency and structure of systematic law? That judicial procedure cannot be conceived as functioning in this purely mechanical or logical fashion is implied in Austin's recognition that the judicial function is in reality included within sovereignty, although the sovereign now ordinarily delegates these powers.¹ Then it would appear that some essential characteristic of sovereignty is carried over into the judicial function, which would then preclude the conception of the judiciary as objectively scientific or mathematical in operation. Even though we grant the possibility of attaining a high degree of precision in the codification, not only of the letter of the law, but of policy as well, yet the judge is by his decision enforcing the will of the sovereign, and hence acting as the agent of that sovereignty. In the delegation of judicial responsibility, a degree of policy-forming or legislative capacity is vested in the judiciary as subordinate to the sovereignty.

A command, then, as embodied in legal formulae, is an expression of the desire of the sovereignty; and what distinguishes this from other expressions of desire is simply that the sovereignty wields sufficient power to enforce its desire, namely, to threaten punishment for defiance of law.² The power resident in sovereignty is thus the source of the legal imperative; but this determination of source does not answer the question of why such external compulsion should be necessary to the formal legal system. Austin makes no attempt to justify this exercise of power over the legal system; in describing the sources of law, he merely says that unless a rule has the expressed or tacit consent and support of the sovereign, it is not a proper law. The force of law is in all cases established immediately by the authority of the sovereign.³ Thus, laws passed by sources subordinate to the sovereign carry his tacit approval; while custom can be interpreted as law only when it is formalized within that legal system which reflects the authority and imperative of the sovereign. Austin is forced to admit that there is no real imperative element in judicial law,⁴

¹Austin, Lectures on Jurisprudence, Lecture XXVIII.

²Ibid., Lecture I.

³Ibid., Lecture XXXVIII

⁴Ibid., Lecture XXXIX.

for to admit it as equally imperative to statutory law would simply be to identify the judiciary with the sovereign itself.

Already there has appeared a close correlation between Austin's treatment of law and jurisprudence and that expressed by Bentham. The latter's concern for the codification of law is well-known; and mention was made of his consistency to this view even in regard to the possibility of a calculus for the judgment of private morals. Bentham likewise appeared to assume that the imperative element of the legal code derived immediately from the sovereignty; and his elaborate analysis of punishment is convincing evidence that on his view the command aspect of law rested upon a power external to the law itself. One of the questions raised in connection with Bentham's analysis was that of how he justified the legislation of pleasures and pains for individuals as such; how, in fact, he justified the exercise of sovereignty by government.

Austin fails to clarify the nature of the legal imperative; for to state its source in sovereignty is not to define its legal status. The active imperative is strictly a legal concept, as Austin admits, in the very first sentence of his work, when he defines law as essentially a command. Yet, the imperative cannot be explained simply as an integral function or part of the legal or formal system, at any rate, not at the level of analysis employed by the Analytical school. In practical terms, the problem may be stated quite simply. It might be conceivable that a board of experts could draft a code of laws for the United States which would incorporate the elements of consistency, flexibility, precision, and availability; it might even be made comprehensible to the layman, and hence obviate one of the greatest difficulties of law in democracy. (Bentham offered to assist in such an enterprise in connection with the federal statutes of the United States, but President Madison was not sympathetic to the project.) But however perfect the code, the question would remain as to how the law was to be implemented. Upon what principle could states, courts, judges, and individuals be persuaded to adopt this uniform procedure? This in itself, it must be admitted, is to pose a problem of magnitude; but consider the additional difficulty involved in enforcing the law after it had been formally accepted. Reliance upon the inherent rationality and intelligibility of the law itself is too optimistic to fit the facts. That, as has been sug-

gested in another connection, is the major premise of utopian thought, a condition the realization of which would make the integration of social structure child's play by comparison with the task of any realistic politics.

It remains that codification, however possible it may appear, is not of itself sufficient to establish the imperative nature of law. For the Analytical view, as we have seen, this imperative depends upon power resident in the sovereignty. The independent function of the judiciary which Austin sought to establish does not appear to follow from his analysis. However precisely the premises of the legal syllogism may be stated, drawing the conclusion is not simply a matter of logical deduction:

The fact may be perfectly ascertained, and so may be the law, as far as it is capable of being ascertained. The rule is known, and so is the given species. . . ; the difficulty is in bringing the species under the rule; in determining not what the law is, but whether the given law is applicable to the given fact.¹

The determination of the applicability of law, I suggest, is itself the very essence of that imperative which is essential to the law as command. Thus, as Austin admits, the real nature of the judicial decision is not that of drawing an indicated conclusion or decision from two established premises, but the much more arbitrary determination of whether any conclusion can be drawn. The judge, in other words, determines whether or not he will apply the code in this particular case; and the formal code does not provide the grounds for such a determination. The judiciary thus exercises a highly arbitrary power of imposing legal imperatives.

The only justification for the exercise by the judiciary of power resident by definition in sovereignty is to regard the judicial function as immediately subordinate to and derivative from the sovereign; and we meet again Bentham's legislator, self-appointed. This would render codification practically impossible, inasmuch as every judicial decision would derive its imperative only from the determination of the will of the sovereign in that particular case. The imperative utilized by judicial analysis is left indeterminate by Austin's failure to define sovereignty. The sovereign is, according to him, necessarily a monarch or an aristocracy, for it can only exist where there is a division of society

¹Ibid., Lecture VI.

into rulers and subjects: "the sovereignty can hardly reside in all the members of a society."¹ The concept of a judiciary as delegated officials of a sovereign breaks down, however, in the actual process of legal development and procedure. Upon what ground can Austin afford to admit that if judiciary law

be generally disliked, although it be perfectly perspicuous, it probably will be abrogated by the tribunals as the instance of public opinion?¹

He will not admit, however, that custom (and how else define "public opinion" in this sense?) is properly law; as positive morality it may be termed a "source" of law; but "its continuance as law depends on the sovereign pleasure."² By a devious route, Austin has brought us to a confusion of the legal imperative which poses the problem for Historical analysis.

The rationalistic basis which had been assumed by previous legal theory, asserting that positive law was the immediate product of human thought, and hence derived its imperative nature from its essential rationality--this documentation of the legal imperative appeared unsubstantial to the Historical jurists. Kant attempted to replace this rational basis of the imperative with a structure which was metaphysical in import, but essentially logical in nature; and the implications of that logical foundation were developed and formulated by Hegel in his identification of ought and is. The structure defined by the Historical school as the ground of the legal imperative was natural in character; and the major deviation which it manifests from the traditional school of natural law is that the Historical school went the whole way in the recognition that positive law has a natural basis. Whereas the natural law school had declared that positive law was constructed on the basis of certain principles of natural law, the Historical school, under the influence of Hegel, asserted that not even positive law could be constructed, but was only discovered or recognized.

This meant that the imperative element of law came to be interpreted as a kind of inevitability manifest in the process of growth and development of society, law, and custom. Custom, as the embodied formulation of that natural code of activity and behavior was thus posited as the comprehensive source of law.

¹Ibid., Lecture XXXIX.

²Ibid., Lecture XXX.

First, custom itself manifestly exerted greater pressure than any other form of legal rule. Custom likewise was reflected in judicial decisions and the accumulation of precedent; and finally, the construction of positive law by legislative bodies was described as an attempt to approximate in systematic form for practical purposes the unformulated and unsystematized body of custom which actually was the law. The Historical school may then be said to comprise those theorists who establish the imperative of law upon the real or actual nature of social structure.

Of greater importance, in the Historical view progress is recognized as over against the more static view of the natural law analysis. Although the Analytic view had not at this time been stated, it is clear that the Historical method would find codes inadequate to express the law; but this does not mean that they rejected the necessity of codification. Codification for the express purpose of maintaining as high a degree of precision and consistency as was possible in judicial procedure was admitted; but the Historical view insisted that this formal structure of the legal code does not explain the principle or source of law; it merely describes a method of applying or utilizing the law. The foundation of the law lies in the society from which the law arises; and its nature will be determined, not by the formal structure, nor yet by any superimposed principle or criterion, but simply by its inherence in the reality of the social process or culture which it reflects. The Historical school is thus objecting to the claim that any real imperative can be derived from the superimposed authority of sovereignty. The only imperative is the command of nature, of social progress.

I do not mean to confuse the two traditional schools of juristic thought, the Historical and what may be called the school of Social Law. The latter analysis may be traced to Grotius and Leibniz, continuing through Kant, Fichte, Hegel, and von Gierke down to Duguit, Saleilles, and Hauriou; and it presents indeed a most respectable array of juristic talent. The view assumed here is that when either the Historical or the Social Law school maintains any consistency of meaning, they will more or less coincide in their description of the source and ground of the legal imperative. I confess frankly that on the whole I find the school of Social Law more consistent in its analysis, apparently due to the fact that the logical and philosophical nature of the problem

seems to be more clearly cognized by that branch of the tradition. The work of Gurvitch¹ merits attention as one of the most comprehensive statements of this point-of-view in juristic analysis.

Gurvitch recognizes the problem involved in describing the imperative element of law; and he states clearly what for our purposes is the major contribution of this juristic method: namely, that external authority or compulsion derived from a sovereignty, regardless of its power, will not suffice to ground the imperative of law. That is indeed a source of law; but the imperative of law derives finally from the relation which it evidences to social structure:

La positivité du droit. . . .se caractérise par deux marques différentes: son caractère établi par une autorité qualifiée qui n'est pas identique à l'autorité de la règle même, et l'efficience réelle de cette règle dans un milieu social donné. . . .il est facile de voir que les 'autorités' habituellement citées comme sources du droit positif: loi coutume, pratique judiciaire, convention (acte-règle), statut, etc., ne donnent par elles-mêmes aucune garantie au sujet de l'efficience réelle de la règle en question.²

What, then, is the ground which will guarantee this reality of operation, or in our terms, the imperative nature, of law? We can now agree with Gurvitch that codification will not produce it, and that judiciary law depends upon some external authority for whatever compulsion it exerts; but Gurvitch says that not even custom or convention displays this imperative nature. This marks the distinction between the Historical and the Social Law interpretations; the latter is aware that the statement of custom as a source of law is not an explanation of the necessary imperative which it must manifest. Gurvitch proceeds to make a distinction implied in our account of the Analytical school:

Cela amène directement à une nouvelle distinction dans le domaine des sources, la plus décisive de toutes: la distinction entre les faits normatif ou sources primaires, et les procédés techniques pour les constater formellement, ou sources secondaires.³

Then it is upon this "fait normatif" that the imperative of law must be grounded; and although custom may serve as a source, and codification as a technique, unless law reflects the essential nature of this norm, it will be deprived of any active impera-

¹Georges Gurvitch, L'Idée du Droit Social (Paris: Libraire du Recueil Sirey, 1932).

²Ibid., p. 133.

³Ibid.

tiveness.

Thus we find that Gurvitch, at the second level of the Formal analysis, is employing a different method and observation to the construction of Law; he does not dispense with, nor minimize the importance of codification; but he does recognize that no imperative exists at the first level of analysis, and that without imperativeness, law is not law, but an abstract system of rules. To what describable fact then does the "fait normatif" correspond?

First, let us note that Gurvitch makes it clear that the law is not simply a mathematical structure; it is definitely a value concept, for he says that if we cannot define justice, "il est illogique d'admettre qu'on puisse définir la notion de droit."¹ Consequently, Gurvitch admits that the distinction between conceptions of law is primarily "une différente interprétation de la Justice en elle-même."² This is a point which appears to have been admitted tacitly by the Analytical view, in the inescapable inference to be drawn from its reliance upon an external source for the imperative of law. In that case, justice becomes the dictate of the sovereign, or of Bentham's legislator, who "compels men to be free." For Gurvitch, however, such a concept of justice is not an adequate ground of law; and he has already asserted frankly that the description of law will follow largely from the definition of justice. We must appreciate this unusual admission of the relation of ideological definition to methodological construction and allow to Gurvitch his principle of justice, and the method appropriate to it, if he can adduce categories to justify his analysis.

The values which are in general indicated by the inclusive term justice are for Social Law resident in the social structure, rather than in the dictates, rationalized or imposed, of individuals:

Les valeurs positives qu'incarne un groupe et qu'il a la capacité de saisir, sont essentiellement attachées à la communauté objective sous-jacente, dont l'organisation du groupe tire son but--les fins limitées, qu'elle se propose de réaliser.³

Now this is not only to define the values which constitute justice as objectively present in the social structure, but when related

¹Ibid., p. 96.

²Ibid.

³Ibid., p. 29.

to the concept of law, it implies an important addition to our notion of legal structure. The assumption that the sole end of law is the realization of justice (and Gurvitch quotes with approval the statement of M. L. Brunschvicg, that "dans chacun des jugements de droit la justice est toute entière en cause"¹)-- this definition of the end of law, when connected with the description of justice as residing in the objective social structure, prepares us for the inference that law is essentially purposive in nature. Thus the construction of law is in the form of a value judgment, directed toward the end of realizing in immediate practice and activity the values of justice which objective social structure present as possible of achievement. Law is thus the exploitation of the value possibilities of society.

This is a significant extension of the analysis of law and the construction of the Formal point-of-view; but the question remains as to the factual reference of the "fait normatif" in accordance with which law is to be formulated. The first criticism to be registered against the Social Law analysis will undoubtedly be that the norm upon which it places utter reliance is in fact nothing more than a scientific generalization. In this sense, the law is not so much a judgment of value as a hypothesis of expediency. The consideration of this criticism will rest upon Gurvitch's ability to adduce fact in support of the real nature of the "fait normatif."

There is no intention here of following the historical development of social objectivity through the profound exposition of M. Gurvitch. The manner in which he describes this normative aspect of the social structure can be indicated more briefly. Bringing his analysis to a summation in his consideration of the work of Maurice Hauriou, as representative of the synthesis of Duguit and Saleilles, Gurvitch dispels the notion that the objectivity to which he refers might be interpreted as a generalization or collectivity:

L'essence primaire de la personne morale et de toute institution en général, ne réside pas dans une volonté collective, pas même dans une conscience collective, mais dans une idée objective, qui se réalise.²

This makes clear the nature of social objectivity as institutional in character; and further indicates Gurvitch's description of

¹Ibid., p. 96.

²Ibid., p. 650.

institution as personal in structure.

Yet the capacity of being personified which is exhibited by some forms of institutionalization is not sufficient to characterize the objectivity which Gurvitch is seeking to describe, for as a matter of fact, there do exist institutions which do not permit personification:

Il y a, selon Hauriou, deux catégories essentielles d'institutions considérées comme sources primaires de droit ou faits normatifs: 1. institutions 'groupes sociaux,' 'établissements,' 'structures sociales,' 'corps,' qui admettent une personification, et 2. institutions qui ne forment pas de totalité, qui sont des 'institutions juridiques sans être des groupes sociaux' et qui n'admettent pas de personification.¹

The existence of these two institutional forms is the source of a continuing conflict between the ground and process of law, between norm and procedure. It is precisely through this conflict and opposition, exerting as it does a mutually corrective and synthesizing effect, that law is enabled to reflect the objective reality which lies as the fundamental ground of the entire process:

Le droit disciplinaire et le droit statutaire que l'institution-corps 'engendre par elle-même,' correspondent précisément à ces deux aspects de la vie juridique. 'Ils représentent dans une certaine mesure la contre-partie et le correctif l'un de l'autre. . . ils se font contrepoids et cet équilibre des droits est un élément de l'équilibre total de forces qui soutient l'institution-corps.'²

It is interesting to note, however, that at the practical level this conflict must always be resolved in favor of procedure rather than of the norm:

Cependant les principes de sécurité, d'ordre et de paix sociale, qui découlent directement de l'idée de Justice, à laquelle sert le droit, exigent nécessairement la prédominance, dans la vie juridique, du droit positif formel sur le droit positif intuitif.³

This description of law as the maintenance of equilibrium between the Formal and the Corporate indicates that the imperative evidenced by that law must have a dual origin:

Le droit social, droit d'intégration d'une totalité, droit de communion en elle, non seulement fonde sa force obligatoire sur le fait normatif de cette totalité, mais encore trouve la matière exclusive de sa réglementation dans la vie intérieure du groupe en question.⁴

Thus sovereignty is pluralized between the forces of the objective norm, the compulsion of the formal code, and the "inner life of

¹Ibid., p. 669.

²Ibid., pp. 680-1.

³Ibid., p. 136.

⁴Ibid., p. 21.

the group," which latter must be the aspect evidenced by the institutional form. The pluralization of sovereignty is real, not fictitious, for "le droit social pur est absolument indépendant de l'ordre du droit étatique."¹

What seems to be evident in Gurvitch's final statement of the imperativeness of law is a recognition that even though the objectivity which constitutes the "fait normatif" can be described, it is nevertheless an order of fact which does not lend itself to implementation in practice as an imperative. It is, in short, the distinction of which we have already spoken, that between logical and active imperatives. There is probably sufficient factual support for Gurvitch's definition of institutional objectivity as an area of observable fact; but the nature of that fact is such that it cannot supply the demand of law for an active imperative. The imperative of the "fait normatif" appears rather logical than active in nature; and the logical imperative cannot be translated immediately into a legal imperative. Let it be repeated, the existence, however observable, of a logical imperative does not assure the status of that imperative in any legal sense, that is, in an active situation or process. Gurvitch seems forced to admit therefore that the legal imperative is peculiar to the judicial institution, and remains thereby a fact of Formal analysis.²

¹Ibid., p. 36.

²In reference to the logical statement of method: the Corporate analysis is stated in terms of immediacy; but the Formal analysis is essentially mediate in character, and its observation must be stated in judgmental form. This mediate formalization can never be attained by Corporate or immediate analysis, nor can it be accomplished by substitution, transference, or analogy. This was the source of Bradley's problem of how the immediate can become an object for itself, and to him it appeared possible only by the operation of inference upon the objects given immediately. The only means by which the "fait normatif" of immediate institutional objectivity can be given Formal or legal statement is by the operation of judgment within the Formal point-of-view; and the element of imperativeness present in immediate fact will not necessarily be reflected directly in the mediated formulation. The imperative of law must be found in the law, and not in the reflection of an imperative peculiar to another analytic point-of-view. This immediate or non-mediated character of the objectivity which serves as the ground of institution and the "fait normatif" is recognized by Gurvitch in the admission that "l'existence de l'institution n'est pas nécessairement liée à une organisation et que la communauté inorganisée sous-jacente est la racine la plus profonde de la structure institutionnelle" (Ibid., p. 675).

As Bentham appeared related to the Analytical school, so is it evident that Jordan manifests a close relationship to the jurisprudence of the Social Law theorists.¹ I must confess that I feel no certainty as to the basis of correlation between Bentham and the Analytical school, or of Jordan and the Social Law point-of-view, other than an evident similarity in their analytic methods. There are certainly very real difficulties to be met in any attempt to establish the correlation more precisely. It seems paradoxical that the political organizations which have been most interested in emphasizing and implementing Individual analysis have been the very societies which have shown the least inclination or competence in codification. On the other hand, codes have become associated with those political forms whose tendency has been to emphasize the Corporate point-of-view. These, and other difficulties, appear to preclude the possibility of connecting Analytical jurisprudence directly to the Individual point-of-view, or Social Law theory to Corporate analysis. On the other hand, our examination has shown clearly that the Analytical method does appeal to the point-of-view of Individualism for a ground of the legal imperative; and Social Law analysis describes the category of Institution as providing that imperative.

We seem to have come to an impasse in our attempt to define the imperative element which is essential to the nature of law. We have, to be sure, discovered a logical imperative, and what may for purposes of distinction be called a factual imperative of immediate fact (which is what is meant by custom when that term means anything); but we have not yet discovered a legal imperative. The Formal analysis is still without an element of imperativeness; which is simply to say that we have not yet defined Law. I regret that I know of no legal theory to which we can turn in this emergency; no jurisprudence which actually defines a legal imperative. There has been a noble effort, mainly on the part of political theorists, to establish this imperative by a redefinition of sovereignty. This trend of speculation can probably be claimed as peculiar to democratic tradition, arising as it does from the postulation that government derives its "just power from the consent of the governed." Among the more recent

¹Cf. Jordan's review of Gurvitch, *L'Idée du Droit Social*, in *International Journal of Ethics*, XLIII (July, 1933), 450.

of those interested to investigate this possibility may be named Woodrow Wilson, Judge Jameson, W. W. Willoughby, and H. Sidgwick. The alternatives seem to be two: that sovereignty is constituted by public opinion, or that sovereignty resides in any state-organ to which authority has been delegated by that public. The difficulty with the first alternative, that of identifying sovereignty with public opinion, is the same trouble encountered in the "fait normatif" of Gurvitch, namely, that it cannot be sufficiently mediated to constitute a real imperative. With the second suggestion, that sovereignty is delegated, the problem arises as to how this limitation of sovereignty can avoid negating the very concept of sovereignty and imperative. This is exactly the question which forced even Austin to attempt a more comprehensive definition of sovereignty than that which held it to reside simply in one or more individuals as such.

If decentralization of sovereignty is to be the only alternative to the dilemma of defining a legal imperative which is not external to the law itself, then the suggestion of Hauriou, as repeated by Gurvitch, has certain values of practicality. But as Gurvitch comments:

La décentralisation par services public et par établissements d'intérêt public, à laquelle Hauriou s'adresse en fin de compte comme au seul moyen de combattre l'étatisme, ne suffit pas pour limiter l'extension dangereuse de la puissance et de la vie publiques.¹

A word of explanation is in order concerning the omission of a third traditional school of jurisprudence--the Sociological. This peculiar American interpretation of the judicial function can hardly be called a proper analysis of the Formal point-of-view. The suggestion that judicial procedure should function according to vague discrimination on a basis of pragmatic expediency is not even an approach to the problem of stating the Formal point-of-view. This so-called judicial "realism" is a too easy escape from the demand for an integration of Formal analysis; and it has brought the courts of the United States into deserved disrepute which is reflected by the public attitude toward law. The analysis of law in the United States means the psychoanalysis of the judges; fundamental changes in the nature of law are accomplished simply by changes in the personnel of the courts. This means that no proper judicial function is being performed; that

¹Ibid., pp. 706-7.

the judiciary has as a matter of fact been transformed into a legislative policy-making body; and instead of a two-party government, we now have a three-party system, with all the possibilities of a two to one coalition or a three-way split. It is a mistake to dignify this rule-of-thumb by calling it a theory, and a misnomer to refer to it as a Philosophical school of jurisprudence (Roscoe Pound). It is an anti-logical interpretation, and as such, denies the basic assumption that method is a prerequisite of construction and integration.

